IN THE

Supreme Court of the United States

October Term, 1978

No. 78-5420

THEODORE PAYTON, *Appellant,*

v.

NEW YORK, *Appellee.*

No. 78-5421

OBIE RIDDICK, *Appellant,*

v.

NEW YORK, *Appellee.*

Appeals from the New York Court of Appeals

BRIEF FOR APPELLEE

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Questions Presented

1. Both cases present the following question: when there is probable cause to believe that a person has committed a violent felony such as murder (*Payton*) or armed robbery (*Riddick*), does the Fourth Amendment prohibit a

police officer from arresting that person in his dwelling during the daytime without an arrest warrant?

2. In *Payton,* there is an additional question: is the appellant entitled to the benefits of the exclusionary rule when (1) police officers found the evidence in plain view after they entered appellant's apartment to arrest him under the express authority of a state statute, and (2) they did so at a time (January, 1970), when neither they nor any other law enforcement official could have had any serious doubt about the legality of following the statute?

Statement of the Case

Payton v. *New York,* No. 78-5420

On Monday morning, January 12, 1970, Theodore Payton, armed with a .30 caliber rifle and wearing a ski mask, walked into a gas station in Manhattan. He demanded the weekend receipts from the manager who was working on them at his desk in the office. The manager complied but then resisted Payton's further demand that he open the safe in the adjoining repair shop. Payton shot the manager during the struggle that followed and escaped with approximately $1,000. The manager died.

Intensive investigation led police officers, three days later (January 15, 1970), to Payton's apartment at about 7:30 in the morning. When the officers arrived, a light was shining from under the door, and a radio could be heard from inside. Believing Payton to be inside, they knocked and called out, but there was no answer. The officers saw that they could not open the metal door, so they called for

help which came about a half hour later. Then, with crowbars, they forced the door open and entered Payton's apartment to arrest him. They entered the apartment under the explicit authority of a state statute that permitted the police, without a warrant, to make such entries in order to arrest felons.* For almost one hundred years this statute had governed procedures for making arrests; its constitutionality had never been seriously questioned.

The officers looked through the apartment for Payton. He was gone. However, in plain view on a stereo set in the living room the officers saw a .30 caliber shell casing which they seized. They also found three photographs of Payton wearing a ski mask, a bill of sale for a .30-30 Winchester rifle, a shotgun, and a bandolier with 14 bullets.

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* Code Crim. Proc. (McKinney 1958 and Supp. 1970):

Chapter IV.—Arrest by an Officer Without a Warrant

* * *

§177. *In what cases allowed*

A peace officer may, without a warrant, arrest a person,

* * *

2. When the person arrested has committed a felony, although not in his presence;

3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it;

4. When he has reasonable cause for believing that a felony has been committed, and that the person arrested has committed it, though it should afterward appear that no felony has been committed, or, if committed, that the person arrested did not commit it;

* * *

§178. *May break open a door or window, if admittance refused*

To make an arrest, as provided in the last section, the officer may break open an outer or inner door or window of a building, if, after notice of his office and purpose, he be refused admittance (footnote omitted).

The Pre-Trial Hearing and the Decision on the Motion to Suppress

Payton was indicted on March 30, 1970 for felony-murder and for intentionally murdering the gas station manager. After a four-year delay, attributable in large part to Payton's commitment as incompetent to stand trial (A.1)* and to his requests for adjournments (T.100),** a pre-trial hearing was held on Payton's motion to suppress the evidence seized from his apartment. Before the hearing, the prosecutor announced that he intended to introduce only the .30 caliber shell casing. He conceded that the other items were seized illegally because they were not found in plain view (A.3-7).

Because of the prosecutor's concession, the scope of the hearing was narrow. It did not focus on the investigation that led the officers to Payton's apartment on the morning of January 15. Instead, it focused on whether their purpose in entering the apartment was in fact to arrest him and whether the shell casing was in fact seen in plain view. The judge's rulings were similarly limited. The judge did not discuss the constitutionality of the Code of Criminal Procedure Sections 177 and 178. Although the opinion did mention that on January 14 the police learned Payton's address and that Payton was the murderer, it did not discuss when on January 14 they first had probable cause to believe he was the killer; when on January 14 they first had probable cause to believe they knew where he lived; when they first had probable cause to believe he was

* References preceded by the letter "A." are to the Appendix.

** References preceded by the letter "T." are to pages of the record not in the Appendix.

at home; when they first decided to arrest him; whether, at that time, they made a decision to arrest him in his apartment; and if not, when they made that decision; whether the officers had time to obtain an arrest warrant; or whether there were any circumstances that might excuse their failure to do so.

The judge simply found that there was probable cause to arrest Payton; that the officers entered his apartment for that purpose; that pursuant to the Code of Criminal Procedure Sections 177 and 178 they did not need an arrest warrant to make such an entry; and that once lawfully in the apartment, they could seize the shell casing which they had seen in plain view (A.39-41). Although the issue was not raised by defense counsel, the judge also ruled that the exigencies of the situation excused the officers from the statutory requirement that they announce that their purpose was to arrest the defendant. He based this ruling on his findings that (1) "a grave offense had been committed;" (2) "the suspect was reasonably believed to be armed and could be a danger to the community;" (3) there was a "clear showing of probable cause;" and (4) there was "strong reason" to believe that Payton was in the apartment and "would escape if not swiftly apprehended" (A.41).

Because the hearing and the judge's findings were so limited, the proceedings on the motion to suppress do not give this Court a full picture of the investigation that led the officers to Payton's apartment on January 15. Accordingly, both Payton and we refer to the testimony at the trial, which added some detail to the broad outlines revealed at

the suppression hearing.* In addition, in a few places we refer to police documents which were marked for identification at the hearing or the trial, given to defense counsel, and used by them in their cross-examination of the state's witnesses. We do so in order to indicate that even more information about the investigation could be developed and to suggest why, depending on what legal principles are ultimately held to govern this case, a remand might be necessary. *See Killian* v. *United States,* 368 U.S. 231 (1961). *See* pp. 80-81, *infra.*

The Investigation that Led the Officers to Payton's Apartment on January 15, 1970

January 12, 1970

The murder occurred at about 8:40 a.m. on Monday, January 12, 1970. The police were called, and a patrol car arrived almost immediately (T.261-63). Detective Malfer, who supervised the investigation, arrived at the gas station at about 9 a.m. He searched the scene, found two .30 caliber shell casings, called for police ballistics experts, fingerprint experts and photographers, spoke briefly with the people who had witnessed the murder, and had them transported to the 23rd Precinct which was nearby. At the 23rd Precinct, Detective Malfer took statements from the eight people who had been at the gas station. None said he or she recognized the man (A.11, T.802-14, 982).

* Indeed, based on the more detailed testimony at trial, defense counsel sought the right (which was granted but not ultimately exercised), to reargue the admissibility of the shell casing (T.837-38).

In fact, two of the eight did know and recognize the killer in spite of his disguise. The first, Melvin Gittens, was at the gas station with his sister and brother-in-law. They were waiting to meet Gittens' lawyer (Robert Stein), before all of them went to the 23rd Precinct where Gittens was to surrender on a charge that he had killed a man in a barroom fight the previous Friday, January 9 (T.284, 291, 294, 337-38, 454-56). Gittens recognized Payton because the two had known each other all their lives, had attended the same junior high school, had seen each other frequently thereafter when they were growing up in the same neighborhood, and, during the year preceding the murder, had seen each other two or three times a week at local bars (T.285-86, 306-18, 331-32, 365-66).

At the 23rd Precinct, Gittens told his sister that he knew the killer and, after some thought about the killer's last name, told her the name was "Teddy Pane" (T.413-14, *see also* T.365). Stein told Gittens that this information might be helpful on his own case, and that he, Stein, wanted to handle the divulgence of that information (T.462). When Gittens spoke to the police that morning, he gave them an account of what he had seen. He did not tell them he knew the killer (T.292-93, 304, 813-14).*

* Raymond Williams, an attendant at the gas station, was the second person who recognized Payton on January 12. The two had known each other for more than a year and had met more than a dozen times in a bar at which Williams had worked (T.495, 527-28). A few weeks before the murder, Williams was at the gas station when Payton had a dispute with another attendant. Williams settled the dispute (T.494, 495-98). Williams did not identify Payton to the police on January 12. He had an extensive criminal record, had not told his employer about it, and was afraid of being exposed if he got "involved" in this case. It was not until January 27, when Detective Malfer re-interviewed Williams, that he identified the killer as Payton (T.498-501, 541-43, 545-53).

January 13, 1970

The day after the murder, January 13, 1970, Detective Malfer spent going back to the gas station, looking for more evidence and for other possible witnesses (T.814).

January 14, 1970

Meanwhile, Stein had arranged a meeting at which his client would divulge his information. On the morning of January 14, Stein and Gittens met with Detective Malfer at the District Attorney's Office. There, Gittens told the detective the name of the killer (T.293, 304, 379-83). Although not explicitly stated in the record, it is likely that Gittens gave the name "Teddy Pane" since that is the name by which he knew the killer (*see* T.413-14).* Thus, for the first time Detective Malfer had a name (albeit not the correct one)—but not a face, a body, or an address to go with it.

When Detective Malfer's interview with Gittens ended is not expressly stated in the record. However, the record does indicate that the interview must have lasted until early afternoon, because, as Gittens testified, he was at the District Attorney's Office "a good while," and he missed lunch (T.381). In any event, after the interview Detective Malfer received a call from the 23rd Precinct directing him to the 40th Precinct in the Bronx, where he was to meet someone with information about the murder (T.816).

At the 40th Precinct, Detective Malfer met Jesse Leggett, a friend of Payton's. Again, the time of this meeting is not stated explicitly in the record but can be reconstructed from Leggett's testimony about what he had done earlier that day. At about 10:30 or 11 a.m. Leggett was at a bar in the Bronx. He was picked up by the Nassau County Police and taken to Nassau County. He was a suspect in a robbery there (as was Payton) and was questioned by the Nassau Police for one to one and a half hours. Then Leggett was brought back to the 40th Precinct in the Bronx where Detective Malfer met him (T.722-25, 728-32). Thus, Leggett's interview with Detective Malfer took place, at the earliest, in the mid-afternoon.

Leggett gave Detective Malfer the following account: Two days earlier, on January 12, 1970, Leggett had heard about the murder from his friend, Raymond Williams, the gas station attendant. Leggett bought a copy of the early edition of the next day's *Daily News,* which contained an article describing "the slaying of a service station manager in East Harlem * * * [who] was cut down at nine a.m. by two shots in the chest from a rifle fired by [an approximately 30 year old] thug" (T.666, 676-77, 794-796A). At about 9:15 that evening (January 12), "Teddy" came in and said, "Jessie, I got a problem. * * * I did something I'm sorry for. * * * I hit a gas station." Leggett then showed "Teddy" the article about the incident in the *Daily News* and asked, "[W]as that him?" "Teddy" responded, "Yes" (T.664-65, 670-71).*

* Detective Malfer's notebook for this case contains a summary of this interview and has the following entry: "Knows perpetrator as Teddy Paine—Payne" (T.297, People's Exh. 4F for Id., Entry for Wed. Jan. 14, 1970, 10 a.m.).

* The signed statement Leggett gave to Detective Malfer on January 14 (T.678, People's Exh. 4R for Id.) is quoted below:

> On Monday evening, about 9 or 10 PM, I stopped at the Shannon View Bar on Cypress Avenue, between 138 Street, and 139 Street. Teddy came in, came over to me, said "I did something today that I am sorry for. I said, "what happened." He said "I can't tell you.' I said "what did you

(footnote continued on next page)

After giving his statement, Leggett drove with Detective Malfer through the Bronx and pointed out the five or six story building where "Teddy" lived. Neither the police nor Leggett went into the building (T.671-72, 783-90, 816-17), but Leggett told Detective Malfer that Payton lived on the top floor (A.11, 34). They returned to the 23rd Precinct in Manhattan where Leggett was shown a series of photographs. At the trial, because of a defense objection, Leggett did not testify about the photographic array (T.817). But Detective Malfer's notebook contains the following entry:

> 1/14/70-Wed: 7:25 PM
>
> In 23RD Sqd office, six (6) photos, numbered on back shown to Jesse Leggett, he picked #4—which was photo of Teddy Payton, and said, "that is the one who told me, he was sorry for shooting the guy in Gas station." (A.20, T.12-13, 829-30, People's Exh. 2 for Id.).

Undoubtedly, the police must have had the name "Teddy Payton" before Leggett was shown the photographic array; otherwise they would not have had Payton's photograph in

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do." He said "I shot a guy, but I didn't mean to do it, I swear I didn't mean to do it, I swear I didn't want to hurt anybody." So I said again, "what happened?" He said I hit a gas station and the guy grabbed the gun by the muzzle, I didn't mean to shoot him. I showed him a copy of the Daily News. he read the article, said again, sorry, I didn't mean to do it. Actualy, he read the article before he told me what had happened. I told him, go home and get some sleep. He said I can't sleep I'm too worried. I said, "what are you going to do." He said "I'm going to go some-where. In a few minutes he left. This was the last time I saw him.

The reason I giving this qutocation I think teddy is mixed up and I dont want to see him hurt because he is a very nice guy.

/s/ Jesse James Leggett

(Notebook Entry for Wed. Jan. 14, 1970).

the array. How or at what time they first learned the name, however, is not in the record. Perhaps Leggett had mentioned it earlier. Perhaps the police did a check of utility companies after Payton's building was pointed out by Leggett. Or perhaps they learned the name in another way not suggested by the record. In any event, after the photographic array, the police had, for the first time, connected the murder with the name of Theodore Payton, a face, and an address.

The record does not state what Detective Malfer did after Leggett identified Payton's picture.* There is nothing to indicate that he and his fellow officers immediately formulated a plan to arrest Payton in his apartment the next morning. True, by then, the officers had probable cause to believe Payton was the murderer; and someone claiming to be a friend of Payton's had pointed out where he lived. However, they also had some reason to believe he might not be there. Payton knew several people at the gas station and must have been worried that they also recognized him. Going home after the murder would not have been his safest course.** Moreover, in no event would the officers have wanted to arrest Payton in his apartment without doing much more planning and work. A private dwelling is a very dangerous place—perhaps the most dangerous place—in which to arrest a murderer who may still have his weapon. Before deciding to arrest him

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* Detective Malfer's memorandum book indicates for January 14: "From Duty 10:30 PM." (T.830, People's Exh. 4T for Id.).

** According to Leggett's statement contained in Detective Malfer's notebook, Payton had said on the evening of January 12 that he was worried, could not sleep and was going "some-where." *See* note at pp. 9-10, *supra*.

there, the officers would have wanted to explore the possibility of finding him somewhere else. At a minimum, if they could not find another place to arrest him, they would have wanted to know more about the building and his apartment in order to minimize the danger to themselves, to Payton, and to innocent bystanders. Who else lived in the building? In his apartment? Was there a floor plan of the apartment available? What would his possible escape routes be?

In fact, the officers did go to arrest him in his apartment the next morning, January 15, at 7:30 a.m., which itself is a strong indication that they had not formulated a plan the night before. If they had, it is likely that they would have arrived earlier, before sunrise, indeed before daylight. Then the officers would have been able to knock on the door at the first light—a relatively less dangerous time because it permits an arrest during daylight but still at an hour when the defendant is likely to be surprised.*

January 15, 1970

Five police officers arrived at the building at 7:30 a.m. (A.12, T.817). "[E]very angle" was covered, although Detective Malfer, testifying four years after the events, could not recall precisely where each officer was stationed (T.898-904). As Detective Malfer approached the door of the apartment, he saw a light from underneath the door and heard a radio from inside. One of the officers knocked

* The fact that the officers did not, on the evening of January 14, formulate a plan to arrest Payton in his apartment is also suggested by Detective Malfer's memorandum book entry for January 15:

> Jan. 15, 1970—Special assigned U.F. 61 #491 (Homicide) *In 23RD Squad office 7 AM* under the Command of Sgt. Hoarty: RE: *Information Perpetrator Teddy was at his home*: 682 E. 141 St. 5C (T.830, People's Exh. 4T for Id.) (emphasis added).

on the door and called out, but there was no answer. The officers saw that they could not open the metal door, so they called Emergency Services, which arrived about a half hour later. With crowbars, they forced open the door and entered (A.12-14, 24-27, T.817-19, 899-902).

They looked through the apartment for Payton, but he was gone. However, the officers saw in plain view on the top of a stereo set a .30 caliber shell casing which they seized. In addition, they found a shotgun and bandolier with 14 bullets in a clothes closet or a linen closet. Either in a drawer or on top of a bureau, the officers found three pictures of Payton in a ski mask and a receipt for a .30-30 Winchester rifle (A.15, 17-18, 28-30). All but the shell casing was suppressed on consent of the prosecutor before the suppression hearing.

The Trial, Conviction, and Affirmance by the Appellate Division

At trial, Gittens and Williams, the two people who knew Payton and recognized him at the gas station, testified that he was the murderer (T.284-88, 365, 492). In addition, Leggett testified that on the evening of the murder, Payton had come to a local bar and admitted committing the crime (T.663-67, 676-77). Finally, there was testimony linking Payton with the murder weapon. Ballistics experts testified that the .30 caliber shell casing found in Payton's apartment three days after the murder was fired from the same rifle as were the fatal shots (T.806-13, 819-23, 1010-15). A gun dealer from upstate New York testified that he had sold a .30-30 Winchester rifle to Payton about two months before the murder (T.592-97, 608, 618-19, 634).

On June 21, 1974, the jury convicted Payton of felony murder but could not reach a verdict on the count charging intentional murder (A.1, T.1267, 1303-05). On October 29, 1974, he was sentenced to a term of imprisonment of from 15 years to life (A.1). On December 16, 1976, the Appellate Division unanimously affirmed the judgment without opinion (A.42-43).

Riddick v. *New York*, No. 78-5421

At about noon on March 14, 1974, police officers went to Riddick's apartment to arrest him on several robbery charges. They knocked on his door, which was opened by his son, saw Riddick sitting up in bed with his hands under a sheet, walked in, announced their authority, and arrested him.* In a search incident to that arrest, the officers dis-

* CRIM. PROC. LAW (McKinney 1971):

§140.10. *Arrest without a warrant; by police officer; when and where authorized*

1. * * * [A] police officer may arrest a person for:

* * *

(b) A crime when he has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise.

§140.15. *Arrest without a warrant; when and how made by police officer*

1. A police officer may arrest a person for an offense, pursuant to section 140.10, at any hour of any day or night.

* * *

4. In order to effect such an arrest, a police officer may enter premises in which he reasonably believes such person to be present, under the same circumstances and in the same manner as would be authorized, by the provisions of subdivisions four and five of section 120.80, if he were attempting to make such arrest pursuant to a warrant of arrest.

(footnote continued on next page)

covered heroin and related narcotics implements. On April 16, 1974, Riddick was indicted for criminal possession of a controlled substance in the fifth degree (more than one-eighth of an ounce of heroin) and for criminally possessing a hypodermic instrument.

The Pre-Trial Hearing and Decision on the Motion to Suppress

Detective Fred Bisogno testified that in June, 1973 he learned that Riddick was wanted in connection with several robbery charges (A.52). At "some [unspecified] time" prior to the arrest on March 14, 1974, complainants in two of these cases had picked Riddick's picture from a photographic array (A.59). In at least one case, a weapon had been used.

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§120.80. *Warrant of arrest; when and how executed*

1. A warrant of arrest may be executed on any day of the week and at any hour of the day or night.

* * *

4. In order to effect the arrest, the police officer may, under circumstances and in a manner prescribed in this subdivision, enter any premises in which he reasonably believes the defendant to be present. Before such entry, he must give, or make reasonable effort to give, notice of his authority and purpose to an occupant thereof, unless there is reasonable cause to believe that the giving of such notice will:

(a) Result in the defendant escaping or attempting to escape; or

(b) Endanger the life or safety of the officer or another person; or

(c) Result in the destruction, damaging or secretion of material evidence.

5. If the officer is authorized to enter premises without giving notice of his authority and purpose, or if after giving such notice he is not admitted, he may enter such premises, and by a breaking if necessary.

Although Detective Bisogno first learned Riddick's "whereabouts" in January 1974 (A.53), it is not clear that the police then had enough information to locate Riddick in order to arrest him. In fact, the detective testified that Riddick "had been in the hospital, Harlem Hospital, under an assumed name, and we had lost all contacts with him" (A.59). In addition, Riddick's appearance had changed from how he looked in a picture in the police's possession (A.51). Because Riddick had been on parole, his parole officer was approached for help (A.51). Either through him, or by other means, the detective did eventually locate Riddick.

At about noon on March 14, 1974, Detective Bisogno together with two other detectives and a parole officer, arrived at Riddick's apartment. The parole officer entered first, exited, and gave a signal. Then Detective Bisogno approached the door. He did not demand entry. He simply knocked. Riddick's son opened the door, and the detective, still standing outside the door, saw Riddick in a bedroom, seated in bed, with his hands underneath a waist-high sheet. Detective Bisogno walked in, announced his authority, and asked the defendant whether his name was Obie Riddick. When Riddick said yes, he was arrested. Fearing that Riddick might have a weapon, the detective—who was holding his own hand on his gun, which was in his pocket—asked Riddick to take his hands from beneath the sheet and get out of bed (A.48-49, 53-55, 57-58).

When Riddick stood up, the detective saw that Riddick was dressed in underwear only. As a safety measure, while his partner watched Riddick, Detective Bisogno searched

the bed and a dresser two feet from the bed. In the top drawer of the dresser, Detective Bisogno discovered the contraband (A.50, 55-57).

The court found the facts essentially as Detective Bisogno had stated them. It held that there was probable cause to arrest Riddick and further, that under Criminal Procedure Law Section 140.10(1)(b), the officers did not need a warrant to effect the arrest. Finally, the court upheld the search incident to the arrest because the officers could reasonably expect that Riddick, a suspect in several armed robberies, might have concealed a weapon in the nearby chest into which he would have to go to get clothes (A.63-66). The judge did not discuss whether it was constitutionally permissible to enter Riddick's dwelling without an arrest warrant.

The Guilty Plea, Sentence and Affirmance by the Appellate Division

After the court denied the motion to suppress, Riddick, on August 19, 1974, pleaded guilty to the lesser charge of criminal possession of a controlled substance in the sixth degree (A.44). On September 24, Riddick was sentenced to an indeterminate prison term of from two and one-half to five years (A.44). He appealed the denial of his motion to suppress, *see* N.Y. Crim. Proc. Law §710.70(2) (McKinney 1971), and the Appellate Division affirmed, with one judge dissenting. By the time of oral argument in this Court, Riddick will no longer be serving the sentence in the instant case, although he will still be incarcerated for armed robbery.

Opinion of the New York Court of Appeals

In the Court of Appeals, a majority of four judges (per Jones, J.) affirmed both convictions, holding that because the officers had "unquestionable probable cause" to arrest Payton for murder and Riddick for armed robbery (A.73-74), it was lawful to enter the dwellings to effect the arrests. The court upheld the constitutionality of the state statutes authorizing such entries without an arrest warrant.

The majority began with appellants' argument: Because a warrant is ordinarily required before the police may enter a dwelling to search for things, "symmetry" requires a warrant before an officer may enter a dwelling to arrest a felon (A.74). This argument was rejected because of the substantial differences between entering to search and entering to arrest. A search contemplates "rummaging through possessions," an "upheaval of the owner's chosen or random placement of goods and articles," and disclosure to the police of many personal items. Entry to search, therefore, "strip[s] bare * * * the privacy which normally surrounds [the householder] in his daily living" (A.75).

An entry to make an arrest, on the other hand, interferes with the privacy of the home to a lesser degree. "[T]here is no accompanying prying into the area of expected privacy attending his possessions and affairs." True, the majority recognized, arresting someone is of "grave import." However, this Court had already held, in *United States* v. *Watson*, 423 U.S. 411 (1976), that an arrest may be made in a public place without an arrest warrant. The majority concluded that the same rule should

apply if the arrest is in a dwelling. "[A]n arrest will always be distasteful or offensive, [but] there is little reason to assume that arrest within the home is any more so than arrest in a public place; on the contrary, it may well be that because of the added exposure the latter may be more objectionable" (A.76).

After concluding that an arrest warrant requirement is much less necessary than a search warrant requirement to protect the privacy of the home, the majority compared the governmental interest in arresting felons with the governmental interest in searching for things. Making entry to effect an arrest without an arrest warrant is "reasonable" in part because the community's interest in catching the felon is so strong. This interest is of a "higher order" than the interest in recovering contraband or evidence (A.76).

Finally, in concluding that it is "reasonable" within the meaning of the Fourth Amendment to arrest a felon in his dwelling without an arrest warrant, the majority relied upon "[t]he apparent historical acceptance in the English common law of warrantless entries to make felony arrests," "the existence of statutory authority for such entries in [New York] since the enactment of the Code of Criminal Procedure in 1881," "the fact that a number of jurisdictions other than [New York] have also enacted statutes authorizing warrantless entries of buildings (without exception for homes) for purpose of arrest," and the fact that the American Law Institute's Model Code of Pre-Arraignment Procedure makes similar provision (A.76-78).

The majority then considered appellants' other arguments. It rejected Payton's contention that the officers did not really enter his apartment to arrest him (A.78). And it rejected Riddick's argument that the entry into his apartment was "statutorily invalid" because the officers failed to give notice of their authority and purpose before entering. The majority held that the statute was not violated because the entry was peaceable (A.80-81).

A fifth judge (Wachtler, J.), voted to reverse Payton's conviction on an issue not now before this Court.* However, he joined the majority in concluding that the shell casing was admissible. Although Judge Wachtler concluded that ordinarily the police need a warrant to enter a dwelling in order to arrest someone, he believed that the officers were excused from obtaining one in *Payton* (though not in *Riddick*). Judge Wachtler found that "from the time of the murder the police had actively sought the killer." Their "continuous and intensive investigation" led them to the door of Payton's apartment "where they had reason to believe he might be hiding." In these circumstances, Judge Wachtler believed "it was reasonable for the police to continue their pursuit into the apartment in order to take a dangerous killer into custody" (A.81-82).

* Judge Wachtler concluded that the evidence given by the upstate gun dealer concerning Payton's purchase of the .30 calibre Winchester rifle should have been excluded because it was the "fruit" of a receipt seized illegally from Payton's apartment on January 15 (A.82-85). The majority held, as did the trial judge and the Appellate Division, that the gun dealer's evidence would have "inevitably" been discovered even if the officers had never seen the receipt (A.78-80). Payton sought review in this Court of the question whether the gun dealer's evidence should have been admitted; however, in noting probable jurisdiction, this Court denied review of the question concerning this evidence (A.97).

Two other judges (Cooke and Fuchsberg, JJ.) also concluded that police officers ordinarily need a warrant to effect an arrest for a felony in a dwelling. They believed that there should be a warrant requirement "regardless of the purpose for which [the] entry is sought" (A.85, 88). These two dissenters found no circumstances sufficient to excuse the failure to get an arrest warrant either in *Payton* or in *Riddick* (A.85, 92-93).*

Summary of Argument

A reading of appellants' brief might lead one to assume that the issue in this case is whether privacy interests are involved—and therefore whether the Fourth Amendment applies—when a police officer makes a felony arrest in a dwelling. Appellants, however, are debating false issues. Of course there are privacy issues involved; and of course the Fourth Amendment applies to arrests within dwellings. The issue is not whether the Fourth Amendment applies but what it commands. Specifically, when a police officer has probable cause to believe a person has committed murder (*Payton*), or an armed robbery (*Riddick*), does the Fourth Amendment prohibit the officer from arresting the defendant in his dwelling during the daytime without an arrest warrant?

Even this way of stating the question is somewhat misleading because it ignores the fact that the question has

* Contrary to appellants' statement repeated several times (Appellants' Brief at 18, 60 & n.44), the majority made no decision about the existence of "exigent circumstances." It ruled that, regardless of whether there were "exigent circumstances," no warrant was required (A.69). The majority was obviously describing appellants' argument, and not its own conclusion, when it used the words "absent exigent circumstances (of which there were none here)" on page A.74.

already been answered quite clearly in the negative by history. For hundreds of years, at common law, a constable was not required to obtain an arrest warrant before arresting a felon in his dwelling. The law recognized the overriding community interest in arresting dangerous criminals. Our English ancestors, however, were also very sensitive to the privacy interests involved whenever a person was arrested, and especially so when the arrest was effected by forcible entry into a dwelling. They chose to protect those privacy interests, not by requiring an arrest warrant, but (1) by requiring the constable to knock and announce his mission before he could enter forcibly, and (2) by holding him liable in damages unless he could make a sufficient showing, after the arrest, that he had arrested the right person. Far from being perceived as a protection, the arrest warrant was seen by some common law authorities as a dangerous device because it served to insulate the constable from liability.

The great spokesmen for liberty in the eighteenth century appreciated this common law heritage. They looked to it for inspiration when they criticized the government abuses that led to the Revolution. These spokesmen were condemning the growing abuses of power to issue and execute search and arrest warrants. Their remedy for these abuses was to reaffirm the principles underlying the common law of searches and arrests—principles which recognized the traditional authority of a constable, without an arrest warrant, to arrest a felon in a dwelling. The Fourth Amendment was intended to embody the same judgment.

Throughout the nineteenth and twentieth centuries it was accepted that a peace officer had the authority, without an

arrest warrant, to make felony arrests in dwellings during the daytime. As of 1975, thirty-six states had legislation on the subject; thirty of them had statutes authorizing such arrests. The American Law Institute has twice approved the validity of these arrests, once in 1932, and more recently in 1975. Until the dictum in *Coolidge* v. *New Hampshire,* 403 U.S. 444 (1971), this Court accepted their validity without question (although without directly deciding the point). Just three years ago, in *United States* v. *Watson,* 423 U.S. 411 (1976), and *United States* v. *Santana,* 427 U.S. 38 (1976), again without deciding the point directly, this Court went far towards recognizing and approving the policies that require that peace officers have the authority to make such arrests.

More precisely stated, then, the question is: Why in the fourth quarter of the twentieth century should this Court reject the wisdom of history and discover in the Fourth Amendment a requirement that an officer must have an arrest warrant before he may arrest a felon in a dwelling? The Court is asked to consider this question in the context of two cases which provide focus for the relevant issues. First, in both cases the arrests were made in the daytime. The Court need not consider special problems raised by nighttime entries. *See Jones* v. *United States,* 357 U.S. 493, 499-500 (1958). Second, both arrests were for serious, armed felonies—murder in *Payton* and armed robbery in *Riddick.* The Court need not consider special problems that might be raised by arrests for less serious felonies. *See United States* v. *Watson,* 423 U.S. at 438 (Marshall, J., dissenting). Third, in each case the defendant was arrested in his own dwelling. The Court

need not consider special problems that might be raised by an entry into a dwelling other than that of the person to be arrested.

In Section I (A) below, we will discuss the history of the constable's authority, without an arrest warrant, to make an arrest for a felony in a dwelling.

In Section I (B) below, we will show that the long-standing acceptance of the authority is based on sound social policy. As the Court recognized in *Watson* and *Santana*, an arrest warrant requirement will severely impede the most basic function of our police—arresting felons and bringing them to court to answer charges. At the same time, arrest warrants will not add significant protections to those already afforded people arrested in their homes. Indeed, in several important respects, an arrest warrant requirement will decrease those protections.

In Section I (C) below, we will urge that if the Court imposes an arrest warrant requirement, it should nonetheless formulate an exception for "exigent circumstances" different from the exception ordinarily applicable when police officers seek to excuse their failure to obtain a search warrant. The definition of "exigent circumstances," we will argue, must give weight to the powerful community interest in arresting felons. Under the formulation we propose, the failure to obtain a warrant in *Payton* should be excused. The officers were engaged in an intensive and continuous investigation which led them directly to the door of someone reasonably believed to be an armed murderer. It was reasonable for them to take the next step and enter the

apartment without first obtaining an arrest warrant. If, however, the Court adopts some other definition of "exigency" then, depending on the definition chosen, a remand would be necessary in order to develop further information about whether it was practicable for the officers to obtain a warrant before they arrested Payton.

Finally, in Section II below, we will urge that, regardless of whether the officers should have obtained an arrest warrant, Payton is not entitled to the benefits of the exclusionary rule. When Detective Malfer entered Payton's apartment, he was acting under the express authority of a state statute. At the time (January, 1970), neither the detective, his fellow officers, their supervisors, nor any prosecutor could have had any serious doubt about the lawfulness of the entry. In these circumstances, it would be a disservice to the salutary purpose of the exclusionary rule to exclude the evidence found in plain view by the officers upon entry.

POINT I

When there is probable cause to believe that a person has committed murder *(Payton)* or armed robbery *(Riddick)*, the Fourth Amendment does not prohibit a police officer from arresting that person in his dwelling during the daytime without an arrest warrant.

A. The Fourth Amendment was intended to reaffirm the common law principles governing searches and arrests which, though protecting the sanctity of the home, did not require an arrest warrant before a peace officer could make an arrest for a felony in a dwelling.

The common law is the source of much of our legal heritage concerning the privacy of the home. For example, the common law developed elaborate protections limiting when a constable could enter a dwelling to search for stolen goods. Before doing so, the constable needed a warrant. This warrant, which was later to serve as the model for the search warrant required by the Fourth Amendment, had to be issued by a magistrate, based on sworn evidence which amounted to probable cause. The objects to be seized had to be particularly described. And the constable had to inventory the things seized and make a return on the warrant.

In spite of the concern about the privacy of the home—expressed in the maxim "a man's home is his castle"—the common law recognized that a civilized society has an overriding interest in ensuring that felons are arrested and brought to justice. This interest was considered much more grave than the interest in searching for stolen goods.

A home—as sanctified as it might be—could not be allowed to serve as a sanctuary for dangerous criminals. Accordingly, the law governing arrests made in dwellings was very different from that governing searches of dwellings. When the constable entered a dwelling to make an arrest for a felony, he did not need a warrant.

1. The Common Law: Peaceable Entries

As long as the entry was peaceable, the common law treated an arrest in a dwelling like an arrest made anywhere else. The common law authorities were aware that in some felony cases there might be time to obtain an arrest warrant. *See, e.g.,* 1 M. Hale, *Pleas of the Crown* 588 (first American ed. 1847) [hereinafter "Hale"]. But, in view of the danger that violent criminals might escape apprehension, the judgment was made not to require the constable to seek a court's approval of the arrest in advance. Rather, when a felony had in fact been committed, it was considered better first to establish custody of the person and then, after the arrest, to conduct judicial proceedings.

This litigation after the arrest, not the arrest warrant, was the way the common law protected those arrested. There was prompt review by a local justice of the peace, who could order immediate release. There was review by the higher courts, which could issue writs of habeas corpus. See 2 Hale 92; *Gerstein* v. *Pugh,* 420 U.S. 103, 114-116 (1975). In addition, the arrested person could sue the constable in a damage action. In such litigation, the officer had to justify the arrest by showing either (1)

that the person arrested had committed a felony, or (2) that there was "suspicion of felony," which meant that a felony had in fact been committed and that there was probable cause to believe that the person arrested had committed it. *See* 2 Hale 84-85, 92; Dalton, Country Justice (1742 ed.) 384. In short, the constable acted at the "peril" of making the required showing after the arrest. Later in the development of the common law, after the practice of issuing arrest warrants developed, *see United States* v. *Watson*, 423 U.S. 411, 429 (1976) (Powell, J., concurring), an officer who arrested under a warrant instead of under his own authority could not be held liable in a damage action even if the warrant had been issued upon less than probable cause.

2. *The Common Law: Forcible Entries*

The common law treated forcible entries to arrest differently from peaceable entries. Before making a forcible entry, the officer—whether he had an arrest warrant or not—was required to state his authority and to demand admittance. Thus, the occupants had the opportunity to open the door and avoid the necessity of force. In this way, the common law tried to avoid violent intrusion in the first place and, if force became necessary, to reduce the danger that could arise if the occupants mistook the officers for criminals entering the house. If, however, those inside would not open the door, it could be broken down. The fact that a grave crime had been committed and that there was reasonable belief that a person had committed it ("suspicion of felony") was sufficient to justify forcible entry into the home.

The principle that "a man's house is his castle" did not permit the person inside to barricade himself in his house and frustrate the arrest. The notice requirement was the way in which the common law reconciled the special concern about forcible entry with the grave community interest in arresting felons. Requiring an arrest warrant was not the solution.

Thus, in the famous Year Book case from the 1400's, long before it became the practice for justices of the peace to issue arrest warrants, we find the statement that forcible entry is not permissible in connection with civil cases but is permissible "for felony, or suspicion of felony." In felony cases, forcible entry was justifiable because of the community's interest in apprehending felons: "for it is for the commonwealth to take them."* Similarly, in 1603, *Semaine's* case—a landmark in establishing the principle that "every man's house is his castle"—stated that the "privilege of house" barred forcible entry of dwellings for

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* 13 Edw. IV, 9a: "[F]or felony, or suspicion of felony, a man may break open the house to take the felon; for it is for the commonwealth to take them." This quotation is from *Burdett* v. *Abbott*, 104 Eng. Rep. 501, 560 (1811). The Year Book case itself is not available in English, according to librarians at the law schools of New York University and Columbia University.

The practice under which local justices of the peace issued arrest warrants developed gradually during the sixteenth and seventeenth centuries. See Holdsworth, A History of English Law (1922), pp. 294-95; Potter, Historical Introduction to English Law (London: Sweet and Maxwell, 1932), pp. 209-10.

Unless otherwise indicated, in quoting from the common law authorities, citations and footnotes are omitted.

purposes of civil litigation. But, forcible entry, after notice, was permissible "for felony or suspicion of felony" because "it is for the commonwealth to apprehend felons."* Dalton, writing shortly after *Semaine's* case, stated that "it is lawful for the King's officers, by force to break open a man's house to arrest offenders being therein * * * for the apprehending of any person for treason, felony or suspicion of felony."**

* 5 Co. Rep. 91a, 77 Eng. Rep. 194, 196-97: "[F]or felony or suspicion of felony, the K[ing]'s officer may break the house to apprehend the felon, and that for two reasons: 1. For the commonwealth, for it is for the commonwealth, to apprehend felons. 2. In every felony the King has interest, and where the King has interest the writ is *non omittas propter aliquam libertatem;* and so the liberty or privilege of a house doth not hold against the King."

** Dalton's Country Justice (1742 ed.), p. 299:

"[I]n these Cases following, it is lawful for the King's Officers, by Force to break open a Man's House to arrest Offenders being therein, if the Doors shall be all shut, so as the Officer cannot otherwise enter the House, *viz.*

1. For the Apprehending of any Person for Treason, Felony or Suspicion of Felony."

Although Dalton does not here state explicitly that the entry may be made without a warrant, his meaning is clear in context. Immediately following the statement we have quoted, which deals with felonies, Dalton lists circumstances, with respect to other offenses, when forcible entry is permissible without a warrant:

"2. Where one hath dangerously wounded another, and then flying into an House the Constable or other Officer upon fresh Suit, may break open the Door, and apprehend the Offender.
So may any other Person besides the Officer.

3. Where there shall be an Affray made in an House, and the Doors shut, the Constable, *etc.* may break into the House to see the Peace kept." (p. 300).

Dalton then goes on to discuss when forcible entry, upon writs or warrants, is permissible in civil cases. In no case, however, could

(footnote continued on next page)

Even after it became common for justices of the peace to issue arrest warrants, the authority of a constable to enter forcibly without a warrant continued to be recognized side by side with his authority to enter forcibly based on a warrant. Thus, Hale—who wrote extensively on the subject of arrests in the mid-1600's—stated that a constable may enter upon a justice's warrant.* However, the constable also has "original and inherent power" with regard to arrests, 2 Hale 88. When a felony has been committed and there is probable cause to arrest, Hale stated, "the constable may break open the door, tho he have no warrant."** Similarily, in the 1700's, Blackstone wrote that

doors be broken "to execute the King's Process (upon the Body or Goods of any Person) at the Suit of any Subject." (p. 300).

Dalton then discusses the controversy about whether arrest warrants were valid at all. He notes that it was "much controverted, whether a Justice of Peace may grant a Warrant to attach Persons suspected of felony" before indictment (p. 403). But it was Dalton's position that "The Officer, upon any Warrant from a Justice, either for the Peace, or Good Behavior, or in any other Case where the King is a Party, may by Force break open a Man's House, to arrest the Offender * * *" (p. 404).

* 1 Hale 583: "by the book of 13 *E.*4. 9.*a.* [the Year Book case discussed above] a man that arrests upon suspicion of felony, may break open doors, if the party refuses upon demand to open them, and much more may it be done by the justice's warrant."

** 2 Hale 91-92: "[I]f there be a felony done, (suppose a robbery upon A.) and A suspects B. upon probable grounds to be the felon and acquaints the constable with it * * *

1. the constable may apprehend B. upon this account, * * *. [I]f the constable should not be allowd this latitude in cases of this nature, many felons would escape, and the party arrested hath no prejudice thereby, for the justice of the peace, to whom in such cases he is properly to be brought, may consider the circumstances, and possibly in some cases discharge or bail him, and upon his trial, if innocent, he will be discharged. 3. But there must be felony in fact

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when a felony has actually been committed, the constable "may upon probable suspicion arrest the felon; and for that purpose is authorized (as upon a justice's warrant) to break open doors, * * *."*

Foster's writings are somewhat ambiguous. He stated that, without a warrant, an officer could not justify a forcible entry based on "bare suspicion." He does not say whether an entry without a warrant could be justified by a showing of probable cause. But he does seem to say, as subsequent authorities have interpreted him, that a warrant was not needed at least if the person inside had in fact committed a felony. In such a situation, the dwelling is "no

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done, and the constable must be ascertained of *that,* and aver it in his plea, and it is issuable.

* * *

3. * * * [I]f the supposed offender fly and take house, and the door will not be opened upon demand of the constable and notification of his business, the constable may break open the door, tho he have no warrant. 13 *E.* 4. 9. *a.* [the Year Book case discussed above] for it is a proceeding for the king by persons by law authorized and therefore there is virtually a ***non omittas*** in the actings of their authority" (emphasis in original).

The editorial footnote to the first American edition of Hale's work states that, in view of Hale's reasoning and his other statements on the subject in 1 Hale 583 (quoted above at p. 31, first footnote), the use of the words "if the supposed offender fly and take house" should not be taken to mean—and were not taken to mean by a later authority, Sir William Russell—that Hale considered forcible entry to be permissible only when there was immediate pursuit. 2 Hale 92, n.12.

* 4 Blackstone's Commentaries (Andrews ed.) 292:

"The constable * * * hath great original and inherent authority with regard to arrests. He may, without warrant, arrest any one for a breach of the peace, committed in his view, and carry him before a justice of the peace. And in case of felony *actually* committed, or a dangerous wounding, whereby felony is like to ensue, he may upon probable suspicion arrest the felon; and for that purpose is authorized (as upon a justice's warrant) to break open doors, and even to kill the felon if he cannot otherwise be taken;" (emphasis in original).

sanctuary" for him; doors may in such a case be forced.* Thus, East, writing after Foster, clarifies Foster's statements by repeating his language and then adding that entry without a warrant "will at least be at the peril of proving that the party so taken on suspicion was guilty." 1 East, Pleas of the Crown, p. 322 (1806 Phila. ed.). See also 1 Russell on Crimes (1819), p. 745. East concludes his discussion of the subject by stating, "according to Lord Hale, if there be a charge of felony laid before the constable, and reasonable ground of suspicion thereon * * * the constable or his watch may break open doors * * *." (*Id.*).**

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* M. Foster, Crown Law (3rd ed. 1792) pp. 320-321: "Where a felony has been committed or a dangerous wound given, or even where a minister of justice cometh armed with process founded on a breach of the peace, the party's own house is no sanctuary for him; doors may in any of these cases be forced, the notification, demand, and refusal before mentioned having been previously made.

"In these cases the jealousy with which the law watcheth over the publick tranquility, (a laudable jealousy it is,) the principles of political justice, I mean the justice which is due to the community, ***ne maleficia remaneant impunita,*** all conspire to supersede every pretence of private inconvenience; and oblige us to regard the dwellings of malefactors, when shut against the demands of publick justice, as no better than the dens of thieves and murderers, and to treat them accordingly.

"But bare suspicion touching the guilt of the party will not warrant proceeding to this extremity, though a felony hath been actually committed; unless the officer cometh armed with a warrant from a magistrate grounded on such suspicion."

** Appellants' Brief, at p. 47, makes much of East's statement that an officer must be in "fresh pursuit" before he may, without a warrant, forcibly enter a dwelling in order to re-take a person who has previously been lawfully arrested and then escaped. 1 East 324. However, East was not writing here about felony cases but about cases of escape—no matter how petty the offense for which the original arrest had been made. The common law authorities treated such "re-taking" cases as a separate category with rules of its own. See, e.g., 1 J. Chitty, Criminal Law (3rd Amer., from 2d London, ed. 1836) 57; 2 Hawkins, Pleas of the Crown (6th ed. 1788), c. 14 sec. 9, p. 138. When the New York Code of Criminal Procedure codified the common law rules of arrest in 1881, special provision continued to be made for such cases. Sec. 187 provided for forcible entry "to retake the person escaping * * *."

Burn (who, like Foster, wrote in the 1700's) stated that a constable may break open doors not only with a warrant, but without a warrant "upon reasonable cause suspected."* Similarly, Chitty, writing in the early 1800's about the body of law which had developed, stated, "A constable may break open doors to take a felon * * * where a felony has in fact been committed by someone, and there be reasonable ground to suspect that a person be the offender."**

* 1 R. Burn, Justice of the Peace (1755 ed.) 71. Burn agreed with Hale that a constable could forcibly enter to arrest without a warrant, and a private person could do so as well, though on more limited grounds than an officer: "[I]t seems that he that arrests as a *private* man, barely upon suspicion of felony, cannot justify the breaking open of doors to arrest the party suspected, but he doth it at his peril; that is, if in truth he be a felon, then it is justifiable, but if he be innocent, but upon a reasonable cause suspected, it is not justifiable. 1 H.H. [Hale] 82.

"But a *constable* in such case may justify * * * 2 H.H. [Hale] 92." [quoted above at p. 32, footnote]. 1 Burn 71 (emphasis in original).

Burn prefaced his discussion of forcible entry with or without a warrant by stating, "as to the case of breaking open doors, in order to apprehend offenders, it is to be observed that the law doth never allow of such extremities but in cases of necessity; and therefore no one can justify breaking open another's door to make an arrest, unless he first signify to those in the house the cause of his coming, and request them to give him admittance." 1 Burn 71.

** 1 J. Chitty, Criminal Law (3rd Amer., from 2d London, ed. 1836) 22-23: "A constable may break open doors to take a felon, if he be in the house, and entry denied after demand, and notice given that he is a constable. * * * So, where a felony has been committed by some one, and there be reasonable ground to suspect that a person be the offender, a constable has a similar power of breaking open doors to apprehend him.

Chitty discussed the earlier authorities and concluded, as Burn had, that a private person may justify forcible entry without a warrant by proving "the actual guilt of the party arrested" and that "reasonable ground of suspicion" will not suffice. But an officer is excused when he is "acting bona fide on the positive charge of another." (1 Chitty 53. *See* first footnote, *supra*, and 1 Burn, Justice of the Peace [1869 ed.] 303; see also p. 301 and Vol. 5, pp. 1134, 1135.) Chitty and the later editions of Burn add the caution

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These common law authorities, who rejected an arrest warrant requirement, developed the protections upon which the modern law of arrest is based. They (1) developed the concept of probable cause as the basis for arrest, whether in a dwelling or elsewhere,* (2) provided for prompt review of arrests by the courts, (3) developed the notice requirement for forcible entry,** (4) limited the role of private persons in making arrests, (5) recognized the validity of arrest warrants which are based upon probable cause and which name or describe the person to be arrested, and (6) imposed an arrest warrant requirement for most crimes but not for felonies. The modern law of searches is based on the protections which these same common law authorities developed: a warrant, issued by a magistrate, upon sworn evidence that amounts to probable cause, particularly describing the place to be searched and

that "the breaking an outer door is, in general, so violent, obnoxious and dangerous a proceeding, that it should be adopted only in extreme cases, where an immediate arrest is requisite." 1 Chitty 53; 1 Burn (1869 ed.) 303.

* *See Samuel* v. *Payne*, 1 Doug. 359, 99 Eng. Rep. 230 (1780); *Beckwith* v. *Philby*, 108 Eng. Rep. 585, 586 (1827); *Davis* v. *Russell*, 5 Bing. 354, 130 Eng. Rep. 1098, 1101-1102 (1829). See also 4 Stephen's New Commentaries (2d ed. 1848) 388 ("upon a reasonable charge of treason or felony, or of a dangerous wounding, whereby felony is likely to ensue, or upon his own reasonable suspicion that any of such offenses have been committed, he may without warrant arrest the party so charged or suspected, and he will be justified in doing so though it should afterwards turn out that the party is innocent, or even that no such offense has been in fact committed. He is also authorized in these cases, as well as upon a justice's warrant, to break open doors.")

** As the common law developed, the degree of "force" which was considered necessary to bring the notice requirement into play was reduced until today the requirement applies when there is no more force than the turning of a doorknob. *Sabbath* v. *United States*, 391 U.S. 585, 590 (1968). It is the unannounced intrusion which is the primary consideration and which the notice requirement directly confronts.

things to be seized, and requiring an inventory and return. *See Entick* v. *Carrington,* 19 Howell's State Trials 1029, 1066-67 (1765).

There were other common law authorities, like Coke, who disagreed with these developments. But, Coke does not aid appellants' position. He was not a partisan of warrants. On the contrary, he rejected the validity of both arrest warrants and search warrants issued by local justices of the peace. He did not recognize the authority of a constable (before indictment) to make arrests except in his capacity as a private person. In his capacity as a constable, he could make an arrest only upon what Coke called a "writ," which was not an arrest warrant issued by a local magistrate but was process issued after indictment. See 4 Inst. 176-78. In fact, Coke rejected most of what was to become accepted law and practice. *Compare* 2 Hale 107-10, 112-14.

But, although Coke disagreed with most of the common law developments, he agreed that, in felony cases, prior judicial approval was not needed before a dwelling could be forcibly entered to make an arrest. Coke preferred the practice of earlier times when most arrests were made by private persons who justified their arrests on the basis of first-hand knowledge that the person arrested had committed the crime. *See United States* v. *Watson,* 423 U.S. at 429 (Powell, J., concurring). Therefore, Coke regarded forcible entry as justified not by an arrest warrant, but by a showing that the person arrested had actually committed the felony, see 2 Hale 90. Similarly, Hawkins, who also believed that a constable had no greater authority to arrest than a private person (2 Hawkins, Pleas of the Crown, c.

13, sec. 7, p. 130 [6th ed. 1788]), stated that forcible entry was proper to arrest a "known" felon "with or without a warrant by a constable or private person."*

3. The Events Which Led to the Adoption of the Fourth Amendment

One of the reasons some common law authorities distrusted arrest warrants was that local justices of the peace might issue them without any basis, i.e., on "bare surmises." Coke. 4 Inst. 178. Arrest warrants abused in this manner deprived the person arrested of his remedy against an officer who made an arrest which was based on less than probable cause. In addition, arrest warrants could be general. And, as Hawkins wrote, the general warrant "might have the effect of an hundred blank warrants" (2 Hawkins, c. 13, sec. 10, p. 132), leaving it to the officer to arrest whomever he chose without any basis whatsoever.

The ability of the warrant, particularly the general warrant, to shield officials from accountability presaged

* 2 Hawkins, Pleas of the Crown (6th ed. 1788), c. 14, pp. 138-139: "where a person authorised to arrest another who is sheltered in a house, is denied quietly to enter into it, in order to take him; it seems generally to be agreed, that he may justify breaking open the doors in the following instances:

* * *

Fifthly, where one known to have committed a treason or felony, or to have given another a dangerous wound, is pursued either with or without a warrant, by a constable or private person. But where one lies under a probable suspicion only, and is not indicted, it seems the better opinion at this day, that no one can justify the breaking open doors in order to apprehend him." Hawkins use of the word "pursued" here does not mean that he considered immediate pursuit to be required for forcible entry in felony cases. When Hawkins meant immediate pursuit, he said precisely that, for example, in his next instance of when doors may be broken: "where those who have made an affray in his presence fly to a house, and are *immediately pursued* by him [the constable]." 2 Hawkins 139 (emphasis added).

developments which led to the Revolution and to the Fourth Amendment. By the 1760's, general warrants, for both search and arrest, were being used in England and the colonies to enforce extensive economic and social programs. Under general search warrants known as "Writs of Assistance," customs and excise officials searched houses, shops and other places for prohibited or uncustomed goods. These writs did not specify the places to be searched or the objects to be seized, required no inventory or return, and were of indefinite duration. In effect, as Otis was to say, these "monsters in the law" lived forever and granted customs and excise officials carte blanche to search anywhere for anything. They did not, however, authorize these officials to make arrests. See Lasson, The History and Development of the Fourth Amendment (1937) [hereinafter "Lasson"], pp. 28-29, 33-34, 37-42, 51-56.

General warrants were also used to enforce regulation of businesses, especially printing. Efforts to control the press led to a Star Chamber decree of 1566 which conferred upon agents of the Stationers' Company broad powers of search, seizure, and arrest as well. Later, executive officials known as "messengers" were issued general warrants to search for prohibited books and papers. Although the legislation authorizing this practice lapsed in 1695, Secretaries of State continued to issue these general warrants in cases of what was termed "seditious libel." See Lasson, pp. 23-28, 31-34, 37-38, 42-43; *Marcus* v. *Search Warrants*, 367 U.S. 717, 724-27 (1961).

These abuses, and the great challenges to them, had nothing to do with the common law authority of a constable

to enter a dwelling to arrest a felon. James Otis, Patrick Henry, William Pitt, and the judges who made the great decisions of the 1760's were condemning something quite different—the vast power of numerous officials to enter every house and every business without proper restraints set by law and without accountability.

Otis condemned the "Writs of Assistance" and gave as an example of its awesome power a Boston customs official who appeared in court to answer for some minor offense. With the power granted by the writ, the customs official told the judge, "I will show you a little of my power," and then searched from top to bottom the homes of the judge and also the constable who had called him into court.* As Otis said, under the Writs of Assistance, customs house officers were beyond the law: "[W]hether they break through malice or revenge, no man, no court can inquire—bare suspicion without oath is sufficient. * * * [N]o one can be called to account."**

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* This example is given by Otis in his argument in the "Writ of Assistance" case, see 2 Legal Papers of John Adams (Wroth and Zobel ed. 1965) 143.

** 2 Legal Papers of John Adams 142-43: "Now one of the most essential branches of English liberty, is the freedom of one's house. A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom house officers may enter our houses when they please—we are commanded to permit their entry—their menial servants may enter—may break locks, bars and everything in their way—and whether they break through malice or revenge, no man, no court can inquire—bare suspicion without oath is sufficient. * * * Again these writs ARE NOT RETURNED. Writs in their nature are temporary things; when the purposes for which they are issued are answered, they exist no more; but these monsters in the law live forever, no one can be called to account. Thus reason and the constitution are both against this writ."

Patrick Henry condemned the power of officials to "go into your cellars and rooms, and search, ransack, and measure everything you eat, drink or wear." He said that officials "ought to be restrained within proper bounds."*

William Pitt condemned the power of officials to enter every home in the English cider regions in order to search for violations of the excise laws. See Lasson, pp. 41-42. He called it a "dangerous precedent" to admit "the officers of excise into private houses". And he reportedly also said, "The poorest man may in his cottage bid defiance to all the forces of the Crown * * *" (quoted in *Miller* v. *United States,* 357 U.S. 301, 357 and n.7 (1958)).

In the great cases of the 1760's, the courts condemned the power of officials to ransack a man's house for hours under a general warrant, going through his "secret cabinets and bureaus" and carrying off his personal papers, whether "libellous" or not, to a clerk for the Secretary of State. *See Entick* v. *Carrington,* 19 Howell's State Trials 1030, 1063-65 (1765). As Lord Camden stated, "To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour;" *Huckle* v. *Money,* 95 Eng. Rep. 768, 769 (1765), *See also Wilkes* v. *Wood,* 98 Eng. Rep. 489, 498 (1763).

* 3 Elliot's Debates on the Federal Constitution (1836 ed.) 448-49: "The officers of Congress may come upon you now, fortified with all the terrors of paramount federal authority. Excisemen may come in multitudes; for the limitation of their numbers no man knows. They may, unless the general government be restrained by a bill of rights, or some similar restriction, go into your cellars and rooms, and search, ransack, and measure everything you eat, drink, or wear. They ought to be restrained within proper bounds."

In short, these great leaders were condemning a power which, as Otis said, "if it should be declared legal, would totally annihilate" the principle that "a man's house is his castle." In condemning these broad and vicious powers, however, they were not also condemning the common law authority of the constable, with or without a warrant, to enter a dwelling in order to arrest a felon. In fact, the structure developed by the common law—both the law of arrests and the law of searches—was a source of inspiration to them. It was the common law which had developed their guiding principle that "a man's house is his castle." In recognizing the right to be secure against "unreasonable searches and seizures" and in prohibiting general warrants, the Fourth Amendment was intended to reaffirm traditional common law limitations on searches and arrests.

Thus, when our forefathers condemned the general search warrant, their model for limiting the power to search was the common law warrant for stolen goods. *See, e.g.,* Otis' argument against the "Writ of Assistance" (quoted above at p. 39, second footnote). *Entick* v. *Carrington,* 19 Howell's State Trials at 1066-67. *Wilkes* v. *Wood,* 98 Eng. Rep. at 498. *See also Marcus* v. *Search Warrant,* 367 U.S. 717, 727 (1961). Similarly, the general arrest warrant was condemned because it unleashed the power of arrest from the moorings developed by the common law. Under these general arrest warrants, whom to arrest was "left to the discretion of the officer." *Leach* v. *Three of the King's Messengers,* 19 Howell's State Trials 1001, 97 Eng. Rep. 1075, 1088 (1765). The officer was free to enter a dwelling to make an arrest, with little or no basis; and no matter how scanty his basis, he could not be

held accountable in an action for damages. See *Entick* v. *Carrington,* 19 Howell's State Trials at 1059, *Leach* v. *Three of the King's Messengers,* 97 Eng. Rep. at 1088. Under the protective principles of the common law, however, the constable could make an arrest in a dwelling; but he could be held liable if he did not have probable cause to believe the person he arrested had committed the felony. Alternatively, the constable could make the arrest under an arrest warrant, which would shield him from liability. But, the warrant was not to be issued except upon probable cause and with "directions" from the magistrate naming or describing the person to be arrested. *Leach* v. *Three of the King's Messengers,* 97 Eng. Rep. at 1088.

4. *Acceptance of Common Law Principles in this Country*

In view of this history, it is not surprising that the law of arrest at common law, as set down by such authorities as Hale and Blackstone, became the law of arrest in this country. American peace officers, both state and federal, had the same authority to arrest as their common law predecessors.* They could make arrests with and without

* United States marshals and their deputies had "the same powers in executing the laws of the United States, as sheriffs and their deputies in the several states have by law, in executing the laws of their respective states." (Act of May 2, 1792, c. 28, §9, 1 Stat. 265; quoted in *United States* v. *Watson,* 423 U.S. at 420, and see 421 n.9, collecting subsequent reenactments.) A sheriff in New York was "*ex officio,* a conservator of the peace" and had the authority to arrest without a warrant. *Coyles* v. *Hurtin,* 10 Johns. Rep. 84, 86 (N.Y. Sup. Ct. 1813) (per Kent, Ch. J.). A constable had similar authority. *See Taylor* v. *Strong,* 3 Wend. 384, 385-386 (N.Y. Sup. Ct. 1829). Police officers in the metropolitan New York area possessed "all the common law and statutory powers of constables except for the service of civil process." L. 1857, c. 569, Sec. 8. *See Burns* v. *Erben,* 40 N.Y. 453, 467 (1869). *See also Shanley* v. *Wells,* 71 Ill. 78, 81 (1873) (equating the authority of an Illinois peace officer with that of an English constable at common law).

warrants in felony cases. For less serious crimes, they generally needed warrants except when the offense was committed in the officer's presence. They could enter dwellings peaceably to effect arrests. And they could enter forcibly as long as they first knocked and announced their authority in order to give the occupant an opportunity to permit peaceable entry.

In the century following the Revolution, there was considerable litigation concerning arrests made without warrants. In deciding those cases, the courts found the governing principles in the English common law authorities.*

* *See, e.g. Holley* v. *Mix,* 3 Wend. 350, 353-54 (N.Y. Sup. Ct. 1829) (discussing Chitty and other English common law authorities, and holding that arrest for a felony is proper without a warrant "whether there is time to obtain one or not."). See also the note following the report of this case in 20 Am. Dec., pp. 705-706, and cases cited therein. See also *Coyles* v. *Hurtin,* 10 Johns. Rep. 84, 86 (N.Y. Sup. Ct. 1813) (reversing a jury verdict against a sheriff who had arrested the plaintiff without a warrant for aiding an escape). *Taylor* v. *Strong,* 3 Wend. 384, 385-386 (N.Y. Sup. Ct. 1829) (citing Hale and other English common law authorities concerning the authority of a constable to arrest without a warrant for breach of the peace committed in his presence). *Hawley* v. *Butler,* 54 Barb. 490, 495-96 (N.Y. Sup. Ct. 1868) (quoting at length from Hale concerning the common law authority of officers to arrest without a warrant in felony cases).

As in England, the common law rules were broadened by removing the requirement that a felony was in fact committed, so that an officer could arrest without a warrant upon reasonable belief that a felony had been committed.) *See, e.g., Reuck* v. *McGregor,* 32 N.J.L. 70, 74 (N.J. Sup. Ct. 1866) ("a peace officer may justify an arrest upon a reasonable charge of felony, although it should turn out that no felony had been committed"). *Doering* v. *State,* 49 Ind. 56, 19 Am. Rep. 669, 670-671 (1874) (quoting from *Holley* v. *Mix, supra*). *See also Eanes* v. *State, 6 Humpreys* 53, 44 Am. Dec. 289, 290-91 (Tenn. 1845), and the note following the report of this case in 44 Am. Dec. at p. 292. *See also Barnard* v. *Bartlett,* 64 Mass. 501, 57 Am. Dec. 123 (1852), *Commonwealth* v. *Irwin,* 83 Mass. 587 (1861), and *Commonwealth* v. *Reynolds,* 120 Mass. 190, 21 Am. Rep. 510 (1876) (broadening the common law rule by permitting forcible entry under a warrant upon reasonable belief that the person to be arrested is inside.).

For example, constitutional claims were made that a peace officer should be required to obtain an arrest warrant unless he could prove that there was no time to get one. Those claims were rejected on the basis of the long common law history and for the same reasons the common law authorities found persuasive: "The public safety, and the due apprehension of criminals, charged with heinous offenses, imperiously require that such arrests should be made without warrant by officers of the law." Whether the officer had the time to obtain an arrest warrant is for the officer to consider "under his official responsibility, and [is] not a question to be reviewed elsewhere." *Rohan* v. *Sawin,* 59 Mass. 281, 285, 286 (1851).*

Once it was settled that a peace officer could arrest without a warrant, the authority at issue here—to make an arrest for a felony in a dwelling without a warrant—was so well settled that there was not one direct constitutional attack on it in the nineteenth century. There were, however, several discussions of this authority in cases considering related issues. These discussions stated what appeared to be obvious—that peace officers had such authority.

In a very early case, *Kelsy* v. *Wright,* 1 Root's Conn. Rpts. 83, 84 (1783), an entry was made under a warrant. In stating that the entry was lawful, the court did not men-

* *See also Wakely* v. *Hart,* 6 Binn. 316, 319 (Pa. 1814) (the rules permitting arrest without a warrant are "principles of the common law, essential to the welfare of society, and not intended to be altered or impaired by the constitution. The whole section indeed was nothing more than an affirmance of the common law * * *."). *North* v. *People,* 28 N.E. 2d 966, 972 (Ill. 1891) (the warrant clause "does not abridge the right to arrest without warrant in cases where such arrest could be lawfully made at common law before the adoption of the present constitution.").

tion the warrant but said that the officer "was lawful constable and had right to break open the door and enter said house * * *." *See also State* v. *Smith,* 1 N.H. 346, 346-47 (1818). In *McLennon* v. *Richardson,* 81 Mass. 74, 77 Am. Dec. 353, 354 (1860), the court, citing the English common law authorities, recognized the authority of a constable to break open doors and arrest without a warrant in "cases where treason or felony has been committed * * *." Such cases are of a "class which requires the immediate intervention of legal authority, on account of the grave nature of the offense * * *." In *Shanley* v. *Wells,* 71 Ill. 78, 82 (1873), the court quoted Blackstone for the proposition that, when a felony has actually been committed, the constable may "upon probable suspicion, arrest the felon, and, for that purpose, is authorized (as upon a justice's warrant) to break open doors * * *." In *Rohan* v. *Sawin, supra,* the court discussed and approved an English case which upheld the lawfulness of entry of a dwelling, without a warrant, to arrest for a felony. 59 Mass. at 285-86. In *Wade* v. *Chafee,* 8 R.I. 224, 5 Am. Rep. 572, 57? (1865), the court relied upon the same English case in upholding the authority of a police officer to arrest without a warrant whether or not there was time to obtain one.*

* The nineteenth century treatises which appellants cite (Br. at 50-53) do not state that an arrest warrant is required for forcible entry in felony cases. Barbour agrees with Chitty (quoted at p. 34, 2d fn., *supra*) that an officer, and a private person as well, may forcibly enter without a warrant in order to arrest for a felony. O. Barbour, A Treatise on the Criminal Law (3rd ed. 1883) 548. (Appellants quote Barbour's statement that it would be "prudent" for the officer the obtain a warrant. This statement was made with respect to the offense of breach of the peace or an "affray." *Id.,* p. 546.) Bishop, as appellants recognize, agreed that no warrant is required in felony cases. 1 J. Bishop, Criminal Procedure (3rd ed. 1880) 109. Heard does not state that a warrant is required but repeats Foster's

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In the latter part of the nineteenth century, the obvious became concrete. There developed a widespread movement to codify the common law. This movement led not to "legislation" as we think of it now, but to civil and criminal codes which "assembled" this law "so as to render it conveniently accessible."* The law of arrest was "assembled" into numerous state statutes which recognized the authority of peace officers, without warrants, to enter dwellings in order to arrest felons. By 1930, 24 of 29 states which had enacted statutes on the subject authorized forcible entry by an officer without a warrant; five states had statutes providing for forcible entry under a warrant.** As of 1975, 30 of the 36 states with statutes

statements, discussed at p. 33, *supra*. F. Heard, A Treatise Adapted to the Law and Practice of the Superior Courts * * * in Criminal Court 148 (1879). Russell and Colby do not require a warrant but say that when the officer arrests without a warrant he may justify the arrest by showing that the person arrested committed a felony. 1 Russell on Crimes (1819) 745. 1 J. Colby, A Practical Treatise on the Criminal Law of the State of New York 74 (1868). *Randall's Case*, 5 City Hall Record 141 (N.Y. Ct. of Oyer and Terminer 1820) concerned an arrest for "dangerous wounding," which the common law authorities treated as a category separate from felony arrests. *See, e.g.*, Dalton, Country Justice (1742 ed.), p. 299 [quoted at p. 30, 2d fn., *supra*].

* "Historical Note," N.Y. Code of Criminal Procedure (McKinney's ed. 1958), pp. 341, 347, which refers to the report made by Commissioners Field, Loomis and Graham in 1849, proposing a code of criminal procedure.

** See American Law Institute, Code of Criminal Procedure (1930), Commentary at 254-55. The New York Code of Criminal Procedure as enacted in 1881 provided for arrest and forcible entry without a warrant "when the person arrested has committed a felony" (Sec. 177(2)) and "when a felony has in fact been committed, and he [a peace officer] has reasonable cause for believing the person to be arrested to have committed it." (Sec. 177(3)). In 1958, the Code was amended to permit a peace officer to arrest without a warrant upon probable cause "though it should afterward appear that no felony has been committed, or, if committed, that the person arrested did not commit it" (Sec. 177(4)). L. 1958, c. 707, Sec. 1. See N.Y. Code of Criminal Procedure (McKinney's ed.), Pkt. Pt., p. 111.

on the subject had such a provision.* For some categories of federal officers, acting in states which had a rule permitting forcible entry without a warrant, Congress has repeatedly adopted the rule by reference. *See United States* v. *Watson*, 423 U.S. at 420-421 and n.9. Other categories of federal officers, in the absence of federal statutory provisions, have been left by Congress to be governed by the law of the state where an arrest without warrant takes place. *See United States* v. *Watson, supra*, 423 U.S. at 420-21, n.8.

The first direct attack on this authority came in the early part of the twentieth century. The Court in *Phelps* rejected the attack and took the authority to be "settled." *Commonwealth* v. *Phelps*, 209 Mass. 396, 95 N.E. 868, 873 (1911). This view was accepted for much of the rest of this century. Major scholars such as Wilgus and Perkins believed that peace officers had such authority.** The

* See American Law Institute, Model Code of Pre-Arraignment Procedure (1975), Appendix XI (collecting state statutes concerning forcible entry). See also Blakey, The Rule of Announcement and Unlawful Entry, 112 U. Pa. L. Rev. 499 (1964), Appendix A (listing 30 states with statutes authorizing forcible entry without a warrant). *See also United States* v. *Watson, supra*, 423 U.S. at 418, n.6.

** Wilgus stated that "the officer, if necessary, may break doors in arresting one who has committed a felony, or one who he has reasonable grounds to believe has committed a felony, whether a felony has or has not been committed * * *." Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 541, 803 (1924).

Referring to forcible entry under a warrant, Wilgus wrote, "Before doors are broken, there must be a necessity for so doing, and notice of the authority and purpose to make the arrest must be given and a demand and refusal of admission must be made, unless this is already understood, or the peril would be increased." (p. 802). Wilgus then stated that "much the same rules apply when arrests

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American Law Institute in 1930, and again in 1975, wrote the authority into its model legislation. ALI, Code of Criminal Procedure (1930), Secs. 21, 28. ALI, Model Code of Pre-Arraignment Procedure (1975), Sec. 120.6(1).*

As far as we aware, until this Court's dictum in *Coolidge* v. *New Hampshire,* 403 U.S. 433, 480 (1971), only one jurisdiction considered the authority at issue here to be unconstitutional. In the case which reached this conclusion, *Accarino* v. *United States,* 179 F.2d 456 (D.C. Cir. 1949), it was unnecessary for the court to decide the point and the opinion misconstrued the common law history. In any event, both before and after *Accarino,* this Court accepted (though without directly deciding) the validity of a police officer's authority to enter a dwelling without a warrant in order to arrest for a felony. In *Johnson* v. *United States,* 333 U.S. 10 (1948), Justice Jackson was emphatic and eloquent about the need for a neutral magistrate to review probable cause before the police could conduct a search. 333 U.S. at 14-15. In that same opinion, he stated that the officers could have entered the hotel room in question without a warrant in order to make an arrest

are made without a warrant, provided the one making the arrest is acting within his lawful right to arrest." (p. 802).

Perkins wrote "As to breaking open doors or windows, assuming this to be necessary to reach the place where the person to be arrested is, or is reasonably supposed to be * * *, the common-law rule is [that] * * * an officer seeking to make an arrest for any crime, either in obedience to a warrant or under lawful authority to arrest without a warrant, may break the doors or windows even of a dwelling house." Perkins, The Law of Arrest, 25 Iowa L. Rev. 201, 245 (1940).

* Under Section 120.6(3), entries during the nighttime, defined as the hours between 10 p.m. and 7 a.m., are permissible only under a warrant or when certain special circumstances are reasonably believed to be present.

"for a crime committed in the presence of the arresting officer or for a felony of which he had reasonable cause to believe defendant guilty." 333 U.S. at 15 (footnote omitted). In *Jones* v. *United States,* 357 U.S. 493, 499-500 (1958), the Court noted, without deciding, the "grave constitutional question" concerning forcible nighttime entries without a warrant but expressed no concern about daytime entries. In *Ker* v. *California,* 374 U.S. 23, 38 (1963), four Justices adopted the rule stated by Wilgus that a dwelling may be forcibly entered without a warrant after notice of purpose and authority is given. Justice Harlan, concurring in the result, did not question this rule. And the dissenters did not question the rule either. They contended only that the officers had not adequately announced their authority and purpose, see 374 U.S. at 47-50 (Brennan, J., dissenting in part). In *Sabbath* v. *United States,* 391 U.S. 585, 588 (1968), the Court stated that the validity of a forcible entry to arrest "without a warrant" is governed by the notice requirement set forth in the federal statute concerning execution of search warrants.

B. The long-standing and widespread acceptance of the constable's authority, without a warrant, to arrest a felon in his dwelling is based on sound social policy.

Throughout our history, it has been recognized that searching dwellings for things and arresting felons in dwellings implicate very different policies and interests. In the centuries before the ratification of the Fourth Amendment, our English ancestors thought it unwise to compel a constable to get an arrest warrant prior to arresting a felon in his dwelling. The Fourth Amendment was intended to reaffirm those common law principles. Following that amendment's adoption, we have lived so satisfactorily without an arrest warrant requirement that, until the past few years, virtually no one suggested changing the traditional law. The question presented here, therefore, is whether in 1979 this Court should reject Justice Holmes' admonition ["a page of history is worth a volume of logic", *New York Trust Co.* v. *Eisner,* 256 U.S. 345, 349 (1921)], invent an arrest warrant requirement, and impose it on the 50 states and on the federal jurisdictions.

United States v. *Watson,* 423 U.S. 411 (1976), and *United States* v. *Santana,* 427 U.S. 38 (1976), decided only three years ago, go a long way toward answering that question in the negative. In those cases, the Court declined to require arrest warrants even though an arrest amounts to a total loss of a person's liberty. Appellants attempt to dismiss these decisions as instances of blind adherence to history. But *Watson* and *Santana* cannot be so easily discarded. The Court deferred to history because it embodied wisdom and experience as relevant in 1976 as in

centuries past: The "balance struck by the common law," 423 U.S. at 421, was still a sensible accommodation among the competing personal and community interests at stake when officers arrest felons.

Of course, the cases now before the Court differ in one respect from *Watson* and *Santana.* In *Watson,* the police arrested the defendant in a restaurant. In *Santana,* after seeing the defendant in the doorway of her home, the officers followed her inside and arrested her there. In *Payton* and *Riddick,* the officers entered to make the arrest without first seeing the defendant outside. The similarities among the cases—in each, the police were arresting for a felony—are much more important than any differences.

1. An arrest warrant requirement will severely interfere with the most basic function of our police—arresting the felon and bringing him before the court to answer charges.

Law enforcement functions are varied, and the community's legitimate interests in these several functions differ in intensity. For example, society may have a strong interest in finding evidence helpful at a trial. That interest pales, however, beside the law enforcement interests at stake in *Watson, Santana,* and the cases now before the Court: the need to catch criminals like Payton and Riddick —both accused of armed felonies—as quickly as possible, in order to bring them to court.

As much as in *Watson* and *Santana,* imposing an arrest warrant requirement in these cases will interfere with this most basic law enforcement function. The requirement will

effect many serious cases. It will pressure police to seek warrants and make arrests too hurriedly. It will increase the likelihood of arresting innocent people. By diverting scarce resources, it will interfere with the police's ability, especially in complicated cases, to do the thorough investigation necessary for the apprehension of the guilty person. During the crucial hours before the arrest, it will penalize the police for deliberate planning. It will, as a direct consequence, lead to more injuries—to police, to defendants and to bystanders.

In 1977, there were in New York City alone 115,121 felony arrests. NEW YORK CITY POLICE DEPARTMENT CRIME COMPARISON REPORT 113 (1977). That year in the United States there were over 17,000 arrests for murder, 25,000 arrests for forcible rape and 122,000 arrests for robbery. F.B.I. UNIFORM CRIME REPORTS 180 (1977). We do not know how many of these arrests were in dwellings. However, the number of arrests in dwellings does not indicate how many cases will be affected by an arrest warrant requirement. The police do not know whether the felon will be found in a dwelling or elsewhere. Consequently, some police officers, exercising caution, may seek an arrest warrant when they do not arrest the felon immediately after the crime. Cases in which the police find the defendant more than two hours after the crime comprise about one-half of felony arrests in urban centers. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE TASK FORCE REPORT: SCIENCE AND TECHNOLOGY 96 (1967).

Even if an arrest warrant requirement affects only those cases in which arrests are ultimately made in the dwelling,

those will certainly be the most serious cases. Arresting a felon in a dwelling is dangerous. NEW YORK STATE POLICE MANUAL 81, 83 (3d ed. 1971) (hereinafter "POLICE MANUAL"). Police will not want to make such an arrest except in grave matters and when absolutely necessary. Since the Indiana Supreme Court adopted an arrest warrant requirement, there have been six reported cases in which that court considered the warrantless arrest of a felon in a dwelling. Three cases involved murder, one involved armed robbery, and one involved kidnapping.* Since the Massachusetts Supreme Judicial Court adopted such a requirement, four reported cases in that court have dealt with warrantless arrests in residences. Two involved murders, and two involved armed robberies.** It is not accidental, then, that the cases now before the Court involve arrests for murder and armed robbery, and not for perjury or embezzlement.

Investigations into serious cases like murder and armed robbery come in an almost infinite variety. Some (like in *Payton*) are fast-breaking—leading from one piece of information to the next and ultimately to the defendant. Others (perhaps like in *Riddick*) are slower—filled with

* *Pawloski* v. *State*, —— Ind. ——, 380 N.E. 2d 1230 (1978) (murder); *Crune* v. *State*, —— Ind. ——, 380 N.E. 2d 89 (1978) (murder); *Barnes* v. *State*, —— Ind. ——, 378 N.E. 2d 839 (1978) (armed robbery); *Banks* v. *State*, 265 Ind. 71, 351 N.E. 2d 4, *cert. denied*, 429 U.S. 1077 (1977) (murder); *Finch* v. *State*, 264 Ind. 48, 338 N.E. 2d 629 (1975) (kidnapping); *Ludlow* v. *State*, 262 Ind. 266, 314 N.E. 2d 750 (1974) (narcotics).

** *Commonwealth* v. *Boswell*, —— Mass. ——, 372 N.E. 2d 237 (1978) (armed robbery); *Commonwealth* v. *LeBlanc*, —— Mass. ——, 367 N.E. 2d 846 (1977) (murder); *Commonwealth* v. *Walker*, —— Mass. ——, 350 N.E. 2d 678, *cert. denied*, 429 U.S. 943 (1976) (murder); *Commonwealth* v. *Moran*, —— Mass. ——, 345 N.E. 2d 380 (1976) (armed robbery).

false starts, winding alleys leading nowhere, periods when no useful information is developed, and other periods when information seems to flow in all at once. Sometimes information comes from responsible citizens or victims of crime (as in *Riddick*); sometimes from criminals (as in *Payton*), alcoholics or drug addicts. Sometimes information comes from documents; sometimes from "street talk." Sometimes the police may be led to useful information by hunches; sometimes by scientific experiment. Sometimes the police will canvass entire neighborhoods; sometimes a witness will simply walk into the stationhouse.

An arrest warrant requirement will operate in this uncertain world of the streets and not in the calm of the courtroom. Before such a requirement is established and imposed on the thousands of police departments throughout the country, its operation should be seen from the perspective of the policeman on the street. It is this officer who will have to shift the focus of his investigation to accommodate any new requirement. We cannot predict how many investigations will be hampered or destroyed. But we believe the number will be substantial. We further believe that the Court will not be able to set guidelines which exclude from the requirement those felony cases in which investigations will be destroyed.

The officer on the street will have to take the new requirement very seriously. If the Fourth Amendment commands that he get an arrest warrant, and he fails to do so, he may face tort suits, civil rights actions, or disciplinary proceedings. He certainly will face the possibility that the felon will be freed because of the suppression of important evidence—the murder weapon, the suspect's admissions

made upon arrest, or the testimony of a witness that he identified the suspect at a post-arrest lineup. *See Crews* v. *United States,* 389 A. 2d 277 (D.C.) (en banc), *cert. granted,* —— U.S. —— (February 21, 1979). In some places, the officer who fails to obtain a warrant will risk a ruling that the court has no personal jurisdiction to try the defendant. *Laasch* v. *State,* 84 Wis. 2d 587, 267 N.W. 2d 278 (1978).

These risks will lead police officers to get the warrant as soon as possible. If he does not, and unforeseen circumstances then require an immediate arrest, the officer risks a ruling, years later in the calm of a courtroom, that the new circumstances will be said to have been "foreseeable" (or indeed "created" by the officer himself). As a result, the evidence will be suppressed because the officer should have obtained a warrant sooner. *See United States* v. *Santana,* 427 U.S. at 48 (Marshall, J., dissenting); *United States* v. *Watson,* 423 U.S. at 450 (Marshall, J., dissenting).

The rush to get the arrest warrant will lead to significant problems. The police will be required "to guess at their peril the precise moment at which they have probable cause to arrest a suspect." *Hoffa* v. *United States,* 385 U.S. 293, 310 (1966). In some cases, the police will make a bad guess and will seek a warrant too soon—that is, before they have probable cause. If the magistrate refuses to sign the warrant, then the police will have taken time from their investigation. If the magistrate, deferring to the public need to seize possible felons, does sign, then any evidence discovered incident to the arrest will be suppressed.

In other cases the police will have probable cause when they seek the warrant. But having probable cause does not necessarily mean that the officers have focused on the guilty person. If the police are pressured to obtain a warrant too quickly, the likelihood of their arresting innocent people will increase. The trauma for the innocent person, wherever arrested, cannot be quantified. In addition, the issuance of the arrest warrant will have interfered with the police's ability to find the right person. At a time when they could, and should, be investigating further, they will have to shift their focus to obeying the command of the warrant—that is, that they find and arrest the person named, book him and bring him to court. All this time, the trail to the real culprit will be getting cold.

Even if, based on probable cause, the police obtain a warrant for the right person, and even if the police continue to gather evidence in order to prove his guilt at trial, the issuance of the warrant will seriously interfere with the on-going investigation. Every new piece of information will have to be brought to the magistrate's attention. If the police develop facts which cast doubt on whether the person named in the warrant is guilty, they would be obligated, even if they still believe there is probable cause, to inform the issuing magistrate of the new information. If the police develop facts which strengthen their view that they have focused on the right suspect, again, they will have to amend their prior affidavits. The validity of the arrest warrant will be judged solely on the basis of the evidence before the issuing magistrate. *Whitely* v. *Warden,* 401 U.S. 560 (1971). Consequently, the police and the prosecutor will want the magistrate to have before him

every piece of evidence which supports a finding of probable cause.

In any serious investigation, numerous amendments of the affidavits will be needed. Witnesses may recant prior statements. The police may learn that an informant was less reliable than first believed. A victim who picked a person from a lineup may subsequently express some doubt. The officers may learn, as they did in *Payton,* that their witness gave the wrong name for the defendant.* On the other hand, the officers may (as they did in *Payton*) locate a second witness who corroborates the information given by the first. They may uncover a second eyewitness. They may obtain the results of fingerprint or handwriting or ballistics analysis, and these results may strengthen their belief that the person named is in fact guilty. All of these facts, and thousands more that could be imagined, will have to be brought to the magistrate who will, in effect, become the supervisor of the investigation.

Thus, a warrant rule will require a shuttle service between the investigating officers and the courts. Each trip will take hours and may consume a major part of an officer's tour of duty. For example, the Second Circuit Court of Appeals recently noted that, in the Southern District of New York, a highly urbanized area in which the courthouse is relatively accessible, federal agents must spend between four and five hours to obtain an arrest warrant. *United States* v. *Campbell,* 581 F. 2d 22, 26-27 n.7 (2d Cir. 1978).

* Were a person arrested on a warrant which did not "truly name" him, the warrant would be invalid and the evidence resulting from the arrest would be suppressed. *See West* v. *Cabell,* 153 U.S. 78, 85-86 (1894); *United States* v. *Jarvis,* 560 F. 2d 494, 497 (2d Cir. 1977), *cert. denied,* 435 U.S. 934 (1978).

One court in California estimated that the time consumed in obtaining an arrest warrant is "between six and eight hours." *James* v. *Superior Court of Tulare County,* —— Cal. App. 3d ——, 151 Cal. Rptr. 270, 272, 275 (1978). In other places, it would undoubtedly take longer. *See Pawloski* v. *State,* —— Ind. ——, 380 N.E. 2d at 1233 (the Indiana Supreme Court assumed that arrest warrants are unobtainable on weekends).

An arrest warrant requirement will divert scarce police resources from the most important phase of the police investigation. At a time when the police should be focusing their attention on questions such as "Do we have the right person?" and "Do we know where to find him?", the police will be forced to consider different questions. Is it time to get a warrant? Is it necessary to bring this new piece of information to the judge? Is a prosecutor available to put the information together in an understandable form? Where are the typists? Is a judge available? Is a court reporter available? How long will it take to drive to the courthouse? Will the judge see us immediately? How long will the appearance before him take? *See People* v. *Burrill,* 391 Mich. 124, 214 N.W. 2d 823 (1974) (arrest warrant invalidated because the issuing magistrate did not sufficiently question the witnesses in support of the warrant). And perhaps most importantly, what portion of the investigation should be postponed while some officers spend hours obtaining and updating the warrant? If society wants the right person to be found and brought to justice, it cannot obstruct the pursuit of the felon with an obstacle as substantial as the arrest warrant requirement.

Appellants suggest that some of these difficulties would be minimized by excusing the police from obtaining a warrant until they actually decide to make an arrest in a dwelling. Appellants' Brief at 37. This suggested rule would create equally substantial problems, both for the courts and the police.

The first question would be, whose decision is determinative, that of the investigating officer, his team, their supervisor, or the district attorney? Then a reviewing court would have to determine exactly when this person or group of people made the decision. This determination would rarely be easy. Investigations are fluid. Bells do not ring when the evidence in the police's possession suddenly amounts to probable cause. As the officers investigate, the belief may grow, then solidify, that the defendant is the right person and should be arrested in his residence. Pinpointing exactly when that belief solidified will be largely dependent on the officer's testimony about his own state of mind and his reconstruction of the events. The difficulties of basing a decision on testimony like this will likely lead the courts to change the question at issue. The litigation will focus not on when the officer in fact decided to arrest in a dwelling but rather on when a reasonable officer would have made that decision. That question often translates into, when does a reviewing court, using hindsight, think that the decision to arrest in a dwelling should have been made?

If we are correct, then the officer on the street will be forced to keep one eye on his investigation and the other on what a court, looking back on events, will believe to be the reasonable time to make the arrest. Officers will be en-

couraged to arrest as soon as posible because, if they wait, they will risk a subsequent ruling that the decision to arrest could have been made sooner—when they had time to obtain a warrant.

The *Payton* case itself is a good example of the dangers of pressuring the police to make arrests too soon. Appellant suggests that the officers could have attempted to arrest Payton in his apartment on the afternoon of January 14 (when Leggett pointed out Payton's building) and should have sought an arrest warrant then. Appellants' Brief at 7, 62. It would, however, have been irresponsible and dangerous to make an arrest then. At that time, the police knew neither Payton's correct name nor what he looked like. They did not know whether he was going to be in his apartment. (In fact, after the murder, Payton told Leggett he was going "some-where." *See* note, pp. 9-10, *supra.*) Also, the police knew nothing about the building or the apartment, for example, whether other people lived with Payton or whether there were escape routes that needed covering. Finally, they had not had time to consider whether there were other, safer places where Payton could be arrested.

Of course, there comes a point in any investigation at which it can be determined with certainty that the police intended to make an arrest in a dwelling. In *Payton,* that time was the morning of January 15, when the officers came to Payton's door, saw a light shining from inside, heard a radio, knocked, called out, and received no answer. According to the rule appellants suggest, the officers should have then, as at many earlier points in the investigation, ceased their activities for the hours needed to obtain an

arrest warrant. Appellants' Brief at 62-63. Presumably, for this entire period, they should have laid siege to the apartment. Under appellants' theory, the dangers of delay in these circumstances—dangers of detection, escape and armed confrontation—are to be ignored. *See e.g., United States* v. *Campbell,* 581 F. 2d at 26-27; *Brooks* v. *United States,* 367 A. 2d 1297, 1303 (D.C. 1976); *United States* v. *Shye,* 492 F.2d 886, 892 (6th Cir. 1974).

The rush to the courthouse that would result from a warrant requirement conflicts with fundamental concepts of safety and effective law enforcement. "An armed subject threatens the safety, not only of the arresting officer but of any nearby man, woman, or child." POLICE MANUAL at 81. The unplanned and ill-considered arrest of armed killers such as Payton has results—possible injuries to officers, bystanders, and defendants. For this reason, policemen should be encouraged to "take as much time as is reasonably necessary to plan arrests." *Id.* at 80. The police also should be encouraged to take the time to plan investigations. With planning, the likelihood of catching the right person increases. The basic problem with the arrest warrant requirement urged by appellants is that, if the police take any deliberate step other than obtaining an arrest warrant, they assume the risk that a subsequent warrantless arrest will be deemed a violation of the Fourth Amendment.

The rule in California, which adopted an arrest warrant requirement in 1976, appears to be identical to that asserted by appellants—that is, any reflective police conduct, even tracking down the killer or planning a safe arrest, proves that a warrant was obtainable. For example, in *People* v.

Ellers, 82 Cal. App. 3d 809, 147 Cal. Rptr. 433 (1978, ***hearing granted***), an undercover agent purchased heroin in an apartment being used for continuing heroin transactions. The agent immediately reported the completion of the sale to an officer waiting outside the residence. That officer then radioed other policemen who, after meeting in a parking lot, spent ten minutes planning the arrest of the heroin dealer. The court held that the officers' brief deliberation conclusively proved that there was no exigency to excuse them from obtaining an arrest warrant. In *Johnny V.* v. *People*, 85 Cal. App. 3d 120, 149 Cal. Rptr. 180 (1978), the police were investigating a particularly brutal murder. In the seven hectic hours after the killing, the police investigated without interruption and ultimately traced the killer to a residence, where they were admitted by the owner of the residence. The police were led to a bedroom which was locked from the inside. The officers knocked, and there was no response. The owner of the residence asked his son (who was inside the room with the suspect) to open the door, which he did, and the officers entered and arrested the suspect. In subsequent litigation, this arrest was found to be unlawful. The reviewing court thought it obvious that the police could have obtained an arrest warrant. *Id.* at 185-86. Therefore, the court suppressed evidence seized incident to the arrest. Implicit in the court's conclusion is reasoning identical to appellants': The "decision to arrest in the home is deliberate" and, if the officers had time to proceed to the residence, "there is no reason why" they could not have obtained a warrant. Appellants' Brief at 37.

Indeed, the warrant requirement espoused by appellants is so inflexible that police risk suppression if, rather than

obtaining a warrant, they eat, rest or go to sleep. For example, in *Payton*, the police were investigating continuously on January 12, 13 and 14. They did not go to Payton's apartment until 7:30 a.m. on January 15. If the officers were resting or eating during the night of January 14 or morning of January 15, the entry to arrest would, under appellants' rule, be unlawful.

Respecting the officers' need to rest and eat has nothing to do with deferring to their personal comfort. At some point, the officers knew that they might go to the door of a suspect believed to be armed with a high-powered rifle. They knew that they might have to knock and call out. Perhaps the answer would have been a bullet through the door or, if the door was forced open, a bullet through the first officer into the room. The most minimal respect for lives requires a recognition that the officers arresting the armed felon will best be able to protect themselves (and others) if alert. Yet, under the rule espoused by appellants, the officer who dares to rest prior to risking his life runs the risk of a court finding that, for example, with a few hours less sleep, he would have had time to obtain an arrest warrant.

The burdens created by an arrest warrant requirement are onerous. Accordingly, several courts other than the New York Court of Appeals have declined to create one.* Other courts have adopted the requirement but without ana-

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* *See United States* v. *Williams*, 573 F.2d 348, 350 (5th Cir. 1978); *State* v. *Linkletter*, 345 So.2d 452, 456 (La.), *cert. denied*, 434 U.S. 1016 (1978); *State* v. *Perez*, 277 So.2d 778, 782-83 (Fla.), *cert. denied*, 414 U.S. 1064 (1973); *State* v. *Luellen*, 17 Wash. App. 91, 562 P.2d 253 (1977).

lyzing the burdens on law enforcement.* Two courts which had adopted such a requirement are now beginning to doubt its validity and wisdom. The Massachusetts Supreme Judicial Court has suggested that it erred when, in 1975, it abandoned the common law rule authorizing warrantless arrests of felons. *Commonwealth* v. *Boswell,* —— Mass. ——, 372 N.E. 2d at 241; *Commonwealth* v. *LeBlanc,* —— Mass. ——, 367 N.E. 2d at 850, n. 2. In December 1978, one panel of judges in the Ninth Circuit Court of Appeals simply ignored a decision four months earlier which had adopted a warrant requirement. *United States* v. *Johnson,* —— F.2d —— (9th Cir., December 19, 1978); *United States* v. *Prescott,* 581 F.2d 1343 (9th Cir. 1978). Other courts, which have not yet expressly stated their doubts about the warrant requirement they created, have nonetheless exhibited their doubts by applying so many exceptions that,

* *See Salvador* v. *United States,* 505 F.2d 1348, 1351-52 (8th Cir. 1974); *United States* v. *Shye,* 492 F.2d 886, 891 (6th Cir. 1974); *United States* v. *Shye,* 473 F.2d 1061, 1067, note 1 (6th Cir. 1973); *Vance* v. *North Carolina,* 432 F.2d 984, 990-91 (4th Cir. 1970); *State* v. *Max,* 263 N.W.2d 685, 687 (S.D. 1978); *Dent* v. *State,* 33 Md. App. 547, 365 A.2d 57, 59-60 (1976).

Other courts, many in light of *Coolidge* v. *New Hampshire,* 403 U.S. 444 (1971), have reserved the issue. *People* v. *Wolgemuth,* 69 Ill.2d 154, 370 N.E.2d 1067, 1070 (1977), *reversing,* 43 Ill. App. 335, 356 N.E.2d 1139 (1976) (the lower court had adopted an arrest warrant requirement); *State* v. *Lashley,* 306 Minn. 224, 236 N.W.2d 604 (1975), *cert. denied,* 429 U.S. 1077 (1977); *State* v. *Girard,* 276 Or. 511, 555 P.2d 445, 447 (1976) (en banc); *People* v. *Burrill,* 391 Mich. 124, 214 N.W.2d 823, 829, note 18 (1974).

In Colorado, the law is unclear. *See People* v. *Robertson,* —— Colo. App. ——, 577 P.2d 314, 316, note 1 (1978); *People* v. *Hoinville,* —— Colo. ——, 553 P.2d 777, 780 (1977) (en banc); *People* v. *Moreno,* 176 Colo. 488, 491 P.2d 575, 580 (1971); Colo. Rev. Stat. former §16-3-102(1)(c) (1973).

in spite of the requirement, many warrantless arrests in dwellings are validated.*

We recognize that in some cases an arrest warrant requirement will interfere with basic police functions less severely than in others. It could be argued that the Court should distinguish between types of cases by adopting a warrant requirement only in cases where it would not interfere with the investigation. This attempt has been made—without, we believe, any success.

For example, in one case, the District of Columbia Circuit Court of Appeals said that a court should consider seven factors in analyzing the permissibility of a warrant-

* For example, warrantless entries to arrest were upheld where the courts found:

(1) a consent-to-enter apparently given at the point of an officer's gun, *United States* v. *Scott,* 578 F.2d 1186, 1188 (6th Cir. 1978);

(2) "exigent circumstances" excusing the failure to obtain an arrest warrant, even though the officers actually had obtained a warrant (which the court ruled defective), *Vance* v. *North Carolina,* 432 F.2d 984, 990-91 (4th Cir. 1970);

(3) the "urgent" need to act even though the urgency was created by the police, *United States* v. *Kulscar,* 586 F.2d 1283, 1285, 1287 (8th Cir. 1978) and *United States* v. *Shye,* 492 F.2d 886, 888 (6th Cir. 1974) (urgency created by visible police presence where, rather than obtain a warrant, six officers remained outside an apartment with the expectation that the lessee would come by and consent to their entry);

(4) exigency where, between the development of probable cause and the arrest, there were four hours to obtain a warrant, *United States* v. *Campbell,* 581 F.2d 22, 24 (2nd Cir. 1978);

(5) "dangers" of flight and destruction of evidence where, aside from the fact that there had been a violent felony, there was concrete evidence of neither, *Pawloski* v. *State,* —— Ind. ——, 380 N.E.2d 1230, 1233 (1978) (murder), *Brooks* v. *United States,* 367 A.2d 1297, 1303 (1976) (rape), and *Stuck* v. *State,* 255 Ind. 350, 264 N.E.2d 611, 615 (1970) (murder).

less arrest. *See Dorman* v. *United States*, 435 F. 2d 385, 392-93 (D.C. Cir. 1970) (en banc). The problem with a set of guidelines such as those in *Dorman* is that, except for extreme situations, they offer little practical guidance to the police. Although the jurisdictions which have adopted an arrest warrant requirement generally make exceptions based on guidelines similar to that in *Dorman*, the decisions are hopelessly contradictory regarding, *inter alia*, the definition of exigency, the reasonableness of the policeman's fear that the felon will escape, the possibilities of obtaining a warrant, and whether or not an entry to arrest was in fact consensual.* As predicted in *Watson*, the arrest warrant requirement has encumbered the criminal process with endless lawyering. *United States* v. *Watson*, 423 U.S. at 423-24. If the Court adopts such a requirement, one could expect the confusion to spread to all fifty states.

Such a result will not be tolerable. A police officer must know in advance, and quite clearly, when he does not need a warrant to arrest a felon in his dwelling. There must be categorical rules, not vague "guidelines" that make sense,

* *See, e.g., United States* v. *Campbell*, 581 F. 2d 22, 26-27 (2d Cir. 1978); *James* v. *Superior Court of Tulare County*, —— Cal. App. 3d ——, 151 Cal. Rptr. 270, 273-75 (1978); *People* v. *Peterson*, 85 Cal. App. 3d 163, 149 Cal. Rptr. 198, 203 (1978); *Johnny V.* v. *People*, 85 Cal. App. 3d 120, 149 Cal. Rptr. 180, 183-86 (1978); *Pawloski* v. *State*, —— Ind. ——, 380 N.E. 2d 1230, 1233 (1978); *In re Scott K.*, 75 Cal. App. 3d 162, 142 Cal. Rptr. 61, 63 (1977, *hearing granted*); *In re Reginald B.*, 71 Cal. App. 3d 398, 139 Cal. Rptr. 465 (1977); *People* v. *Superior Ct.*, 68 Cal. App. 3d 780, 137 Cal. Rptr. 586 (1977); *Brooks* v. *United States*, 367 A. 2d 1297, 1302-03 (D.C. 1976); *Banks* v. *State*, 265 Ind. 71, 351 N.E. 2d 4, 9, *cert. denied*, 429 U.S. 1077 (1977); *Commonwealth* v. *Walker*, —— Mass. ——, 350 N.E. 2d 678, 683, *cert. denied*, 429 U.S. 943 (1976); *Commonwealth* v. *Moran*, —— Mass. ——, 345 N.E. 2d 380 (1976); *Finch* v. *State*, 264 Ind. 48, 338 N.E. 2d 629, 631 (1975).

if at all, only in the calm and safety of the courtroom. The Court has already recognized the need for categorical rules in similar circumstances. *United States* v. *Robinson*, 414 U.S. 218 (1973); *see* LaFave, *"Case-by-Case Adjudication" versus "Standardized Procedures:" The Robinson Dilemma*, 1974 SUP. CT. REV. 127. In fact, in this regard, *Watson* is indistinguishable from this case. In some circumstances, the police might be hampered by having to obtain a warrant to effect an arrest in public; in others, they would not be hampered. To distinguish between these situations, this Court was urged to adopt a warrant preference qualified by various exceptions (Respondent's Brief in *United States* v. *Watson*, *supra*, at 6-8). Nevertheless, the Court recognized the severe limits of case-by-case litigation—that is, that ambiguous rules make it difficult, if not impossible, for the officer to determine beforehand whether his conduct will be proper. The Court held, categorically, that warrants would not be required. As much as in *Watson*, the same categorical rule is needed here.

2. *Because searching a dwelling involves very different interests than arresting a felon there, a warrant requirement—necessary in the context of searches—is neither necessary nor advisable in the context of arrests.*

Against the weight of common law history, the history of the Fourth Amendment, the legislative approval and judicial acceptance of arrests in dwellings without arrest warrants, the community's overwhelming interest in capturing felons, and the serious burdens a warrant rule would impose on law enforcement authorities, appellants offer only an argument based on the false "logic" of

"symmetry." Officers ordinarily need a warrant to enter a dwelling to seize things. Therefore, the argument runs, they must also need a warrant to enter a dwelling to seize a person. This argument ignores the fact that, as our predecessors realized, searches and arrests, no matter where effected, involve different interests and social policies.

Certainly, arresting someone in his home amounts to a serious intrusion. But the major part of that intrusion derives from the fact of arrest itself. In a fairly large number of cases—for example, Riddick's—the entry may be relatively inoffensive: A simple knock leads the suspect or some other person to open the door, at which time the suspect appears in the officers' view. *See, e.g., Commonwealth* v. *Boswell,* —— Mass. ——, 372 N.E. 2d at 241 (1978); *see also United States* v. *Santana,* 427 U.S. at 42. An arrest, however, regardless of where it is effected, constitutes virtually a total loss of the arrested person's liberty and privacy. It subjects him to detention in hostile surroundings, indignities (like being searched, handcuffed and fingerprinted), and damage to reputation and future job prospects. It may also expose him to physical injury, loss of present employment or schooling, and impairment of ties with family and friends. *See generally Gerstein* v. *Pugh,* 420 U.S. 103, 114 (1975); ALI, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Commentary to §120.1 at 290-91 (1975) (hereinafter "PRE-ARRAIGNMENT CODE"). Nonetheless, this Court has already held that no warrant is necessary to unleash the dire consequences set in motion by an arrest. *United States* v. *Watson, supra; United States* v. *Santana, supra.*

According to appellants, the fact that the arrest takes place not in public but in a dwelling adds to the suspect's loss of liberty and privacy even though an arrest inside is screened from the prying eyes of the world. It is this claimed additional "loss" that makes the arrest within the dwelling just the same as the search of a dwelling and justifies the imposition of a warrant requirement. This argument misconceives (1) the nature of a search within a dwelling, (2) the nature of an arrest in the dwelling, and (3) the effectiveness or usefulness of a warrant in protecting the different interests involved.

Evidence of crime may be found anywhere and in almost anyone's possession. As our forefathers well understood, the power to search for evidence subjects every citizen, no matter whether law-abiding or not, to the intrusive power of the police. *See, e.g., Zurcher* v. *Stanford Daily,* 436 U.S. 547 (1978); *Bumper* v. *North Carolina,* 391 U.S. 543 (1968). This power is most grave and subject to greatest abuse when the things to be seized may be found in a person's home. The police may have to rummage through the whole house, exploring every nook and cranny, before they find the object of their search. They may spend hours opening closets, poking through drawers, prying up carpets, ripping upholstery. *See, e.g., Entick* v. *Carrington,* 19 St. Tr. 1029 (1765); *Mincey* v. *Arizona,* —— U.S. ——, 57 L.Ed. 2d 290, 298 (1978). The smaller and more fungible the items sought, the longer and more intensive the search that is need to insure that all of the articles have been uncovered. And when the officers are hunting for documents, they can open file cabinets and desk drawers and read through masses of personal papers until

they find the particular files or records in question. Finally, the police may leave with things of particular value, financial or personal, to the owner.

For these reasons, the search warrant requirement is essential. A search warrant limits the scope of the officers' quest by requiring that the objects of the search be particularly described. *Coolidge* v. *New Hampshire,* 403 U.S. 443, 467 (1971) (plurality opinion). *See, e.g., Mincey* v. *Arizona, supra; Andresen* v. *Maryland,* 427 U.S. 463 (1976). A search warrant also informs the occupant of the purpose and bounds of the officers' mission and assures him that their objective is lawful. *See Camara* v. *Municipal Court,* 387 U.S. 523, 532 (1967). Finally, a search warrant provides for the prompt return of the property to the court's control, so that issues regarding right of possession or use in evidence can be determined as soon as possible. *See, e.g.,* N.Y. CRIM. PROC. LAW §§690.45(7), 690.50(5) (McKinney 1971). *See generally* PRE-ARRAIGNMENT CODE §220.4(2) and Commentary at 516. Ordinarily, no such safeguard governs the disposition of items seized in the course of a warrantless search. *Id.,* Commentary on Article 280, at 555-56.

The authority to arrest a felon in his dwelling involves very different interests. Inherent in this authority is its own limitation. Police officers may not enter a suspect's dwelling unless they have probable cause to believe he has committed a felony and is inside. *See, e.g.,* N.Y. CRIM. PROC. LAW §§140.10(1)(b), 140.15(4) (McKinney 1971); PRE-ARRAIGNMENT CODE §§120.1(1)(a), 120.6(1). Many fewer people are subject to this power than to the power to

search; and those who are subject to the arrest power are much less likely to be law-abiding citizens.

In addition, before the officer enters a dwelling he must give the suspect the right to surrender peaceably and thus avoid a trauma associated with the power to arrest inside a dwelling—a forcible entry. Only if he is denied admission after stating his authority and purpose can he proceed to "break" the door. *See generally Sabbath* v. *United States,* 391 U.S. 585 (1968); *Ker* v. *California,* 374 U.S. 23, 37-41, 46-59 (1963) (plurality opinion and opinion by Brennan, J.); *Miller* v. *United States,* 357 U.S. 301 (1958); N.Y. CODE CRIM. PROC. §178 (McKinney 1958); N.Y. CRIM. PROC. LAW §§120.80(4), 140.15(4) (McKinney 1971). An arrest warrant would neither enhance nor enforce the protections of the "knock and announce" laws.

If the officers must force their way in to make the arrest, again, an arrest warrant would be of very limited utility. Unlike when the police enter to search, a warrant would not be necessary to define the scope of their mission, which is quite clear and quite limited: to arrest a particular person. Nor, when officers make an arrest in a dwelling do they need a warrant as a form of credentials. They are engaging in their best accepted, most basic law enforcement task; and the suspect will usually have "every reason to expect the [policeman's] knock on the door." *Vance* v. *North Carolina,* 432 F.2d 984, 991 (4th Cir. 1970).

True, in some cases, as appellants mention, the arrest might involve a cursory glance of personal items, the presence of persons other than the suspect, or looking around for the suspect himself. But the officers will have little in-

terest in prolonging their stay or their search beyond what is necessary. Self-interest dictates that the police leave as quickly as possible. Arresting an armed felon in his home is dangerous since the suspect is on familiar "turf." Therefore, as the New York State Police Manual instructs, the suspect "should be promptly removed." POLICE MANUAL at 83. If, in any particular case, the police search beyond what is necessary to accomplish their goal, whatever they find will be suppressed. *See Vale* v. *Louisiana,* 399 U.S. 30 (1970); *Chimel* v. *California,* 395 U.S. 752 (1969).

Lastly, and once again unlike when there is a search for evidence, when police officers arrest a felon in his dwelling there is no need for a warrant in order to ensure a "return." When arrested with or without a warrant, the suspected felon must be brought before a court promptly. *See, e.g.,* N.Y. CRIM. PROC. LAW §140.20(1) (McKinney 1971). *See generally Gerstein* v. *Pugh, supra.* The judicial system then mobilizes so that the deprivation of liberty may be tested.

The arrest warrant, in its sphere, simply does not serve the same protective function as does the search warrant in its. Indeed, in many respects an arrest warrant requirement will limit protections already afforded suspects arrested in their homes. For example, an arrest warrant requirement will strip those falsely arrested of their historic right to damages, because the mere existence of an arrest warrant—even if not based on probable cause—will ordinarily shield the officer from liability. W. PROSSER, LAW OF TORTS §25, at 127-28 (4th ed. 1971); ALI, RESTATEMENT (SECOND) OF TORTS §122 (1965). *See, e.g., Stine* v. *Shuttle,* 134 Ind. App. 67, 186 N.E.2d 168 (1962) (en banc); *Rush* v. *Buckley,* 100 Me. 322, 61 A. 774 (1905); *Pallett* v. *Thompkins,* 10 Wash.2d 697, 118 P.2d 190 (1941). And, in spite of what appellants may say about the theoretical defenses available to police officers, Appellants' Brief at 54 n.37, plaintiffs in fact recover substantial awards, even when the officer-defendants did not engage in egregious conduct. *See, e.g., Broughton* v. *State,* 37 N.Y.2d 451, 335 N.E.2d 310, 373 N.Y.S.2d 87, *cert. denied,* 423 U.S. 929 (1975) (two cases: one award was $5,000; the other was unspecified); *Smith* v. *County of Nassau,* 34 N.Y.2d 18, 311 N.E.2d 489, 355 N.Y.S.2d 349 (1974) (damages of $15,000); *Velovic* v. *City of New York,* N.Y.L.J., Feb. 9, 1979, p. 12, col. 1 (N.Y. Civ. Ct.) ($150,000 jury award conditionally reduced to $22,000). *See also St. Louis Globe-Democrat, Weekend ed.,* Sept. 30-Oct. 1, 1978, p. 17A, col. 1 (family awarded $45,000 in false arrest case). A recent study by the International Association of Chiefs of Police, which surveyed litigation against policemen over a period of five years, showed that (1) false arrest suits constituted over 40% (the largest category) of the steadily rising number of actions against officers, (2) in a substantial proportion of all the actions brought against officers, the plaintiff received some kind of satisfaction either through settlement or, less frequently, by victory in court, and (3) in the suits that were tried and won by the plaintiff, the mean verdict was somewhat more than $3,000.*

In some jurisdictions, a warrant requirement may result in longer detention of people who have been taken into cus-

* *See* IACP, SURVEY OF POLICE MISCONDUCT LITIGATION 1967-71, at 5-7 (1974).

tody but who are not guilty. For example, under present New York procedures, the arresting officer or his superiors may review the evidence, listen to whatever the defendant wants to say and evaluate his story. Then the officers can decide that no probable cause exists to believe that the defendant committed the crime and, consequently, liberate him at the stationhouse. N.Y. CRIM. PROC. LAW §140.20(4) (McKinney 1971). Similarly, when the suspect is brought to the prosecutor who will prepare the case for arraignment, that prosecutor may in his discretion order the release of the arrested party. These options will be foreclosed under an arrest warrant procedure, since a warrant is not simply a license to arrest; it is a command to take a person into custody and produce him before the court. *See* N.Y. CRIM. PROC. LAW §120.10(1) (McKinney 1971). *See also* Comment, *The Legal Efficacy of Probable Cause Complaints in Light of People* v. *Ramey*, 13 CALIF. WESTERN L. REV. 456, 471 (1977) (same problems under California law).

Lastly, and ironically, an arrest warrant requirement will limit the ability to test the one thing the requirement is supposed to ensure—the existence of probable cause. A person arrested without a warrant may challenge the existence of probable cause in a hearing on a motion to suppress evidence. *See, e.g.*, N.Y. CRIM. PROC. LAW §710.60(4) (McKinney Supp. 1978). At that hearing, the basis for the officer's conclusion of probable cause can be explored; the officer's credibility will often be an important factor in the judge's decision. If the defendant succeeds in his challenge he will get a tremendous benefit—the suppression of probative evidence against him. Theoretically, the suppression will also serve to deter future entries without probable cause. By contrast, one

who is arrested upon a warrant will find that his ability to question the officer and attack his credibility is severely limited. Except in the rare instance when the defendant can allege and prove that the affiant made a reckless or intentional misstatement, vital to the issuance of the warrant, the attack on the existence of probable cause will be limited to the face of the affidavits. *Franks* v. *Delaware*, —— U.S. ——, 57 L.Ed. 2d 667 (1978).

An arrest warrant requirement, we believe, has only one thing in its favor. In some cases a magistrate might refuse to sign the warrant when the police have not shown probable cause. The police would therefore not arrest the suspect in a dwelling at that time. Even here, though, the warrant requirement will be a very imperfect tool. Forced to make quick determinations, in *ex parte* proceedings, overburdened magistrates sometimes issue even search warrants routinely "without serious consideration of whether probable cause exists." LaFave, *Warrantless Searches and the Supreme Court: Further Ventures Into the "Quagmire,"* 8 CRIM. L. BULL. 9, 27 (1972) (hereinafter "LaFave, *Warrantless Searches*"). The reported cases, not surprisingly, document many instances of judicial error in approving search warrants. *See, e.g., Spinelli* v. *United States*, 393 U.S. 410 (1969); *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *State* v. *McMillin*, 206 Kan. 3, 476 P.2d 612 (1970) (warrant invalid; search upheld on other grounds); *Application of Gray*, 155 Mont. 510, 473 P.2d 532 (1970). When magistrates are asked to pass upon arrest warrants, limitations on their ability to provide an effective screen will be even greater. *See generally* LaFave, *Warrantless Searches* at 27. There will be thousands of such applica-

tions; and especially when serious crimes are involved, magistrates may respond to the strong community interest in apprehending dangerous felons by "rubber-stamping" the applications. The pressure arising from knowledge that capture of a murderer or robber, possibly armed, might depend on the warrant's prompt issuance will frequently prove to be irresistible.

To summarize: In most respects an arrest warrant requirement is not needed to protect the personal interests at stake when an officer arrests a felon in his dwelling. In other respects, the requirement will actually reduce protections. In the one way that the requirement might do some good, it will be a very imperfect device. On the other hand, an arrest warrant requirement would place an enormous and, we believe, unacceptable burden on the police's ability, quickly and safely, to catch dangerous felons. Even if the Court were being asked to rule on what is preferable social policy, and not what is required by the Constitution, a warrant rule would simply not be worth the price.

C. Even if arrest warrants are generally required, Payton's arrest without a warrant was proper because it was the result of a continuous and intensive pursuit of an armed killer.

The community has a much greater interest in the apprehension of felons than in the seizure of evidence. Even if the difference does not dissuade this Court from imposing an arrest warrant requirement, it should, we believe, dissuade the Court from making the requirement excessively rigid. Weight must be given to the strong community interests involved. A reading of many cases which apply

an arrest warrant requirement leaves the reader with the powerful sense that, no matter what the reasoning or the language used, most of these courts recognize these legitimate community interests and find ways not to interfere with the apprehension of dangerous felons. Often the courts do so, properly, by excusing the failure to obtain an arrest warrant in circumstances that would not justify the warrantless search for evidence. *See* cases collected in footnote at p. 65, *supra*.

Ordinarily, a warrantless search of a dwelling can be excused only if there is concrete proof that evidence will be destroyed during the minutes or hours necessary to obtain a search warrant. *See Roaden* v. *Kentucky*, 413 U.S. 496, 505 (1973); *McDonald* v. *United States*, 335 U.S. 451, 454-55 (1948). The standard for warrantless arrests should not be so severe. Armed felons are dangerous and mobile. The police need leeway in deciding how and when to arrest. They must consolidate their evidence; discuss the plans for arrest; eat and rest so that, if there is an armed confrontation, they will be prepared. During this crucial period, the officers should not be asked to predict how long it would take to get a warrant and whether, while a warrant is sought, the suspect will escape.* In short, their attentions should not be diverted from their important tasks. *See* pp. 54-63, *supra*.

In the volatile world of apprehending felons, the courts should be, and have been, reluctant to second-guess the

* *See United States* v. *Brown*, 540 F. 2d 1048, 1055 (10th Cir.), *cert. denied*, 429 U.S. 1100 (1977) (warrantless arrest three days after an armed robbery upheld despite claim that, since felon was found in his dwelling, he obviously was not planning to flee).

investigating officers. In one Indiana case, the police had probable cause to arrest the defendant for murder at 5:00 p.m. However, the officers did not arrest him until the early morning hours of the next day. The reviewing court held that the circumstances were "exigent." *Banks* v. *State,* 265 Ind. 71, 351 N.E. 2d 4, *cert. denied,* 429 U.S. 1077 (1977). In a recent federal case, the police arrested an armed bank robber four hours after first having probable cause. *United States* v. *Campbell,* 581 F. 2d 22, 24 (2d Cir. 1978). The court stated that the officers were "not obligated by the Fourth Amendment" to aggravate "the existing risk of violence, escape and destruction of evidence by waiting until a warrant could be obtained." *Id.* at 27. Whether or not they say so explicitly, these cases, and many others,* recognize that the courts should not require an interruption of the continuous pursuit of the felon who is armed, dangerous, and only a step or two beyond the officers.

The same factors are present here. Payton committed a murder with a high-powered rifle. After the murder, as the hearing judge found, the officers had reason to believe that Payton was still "armed and could be a danger to the community" (A.41). For two days after the murder, the officers investigated intensely but without success. Then, on January 14, evidence regarding the identity and location of the gunman quickly began to emerge. Detective Malfer met one witness at the Manhattan District Attorney's Office in the morning, and then drove to meet another witness in the Bronx in mid-afternoon. Detective Malfer was with this witness the rest of the day and evening—talking to him, going to Payton's building, and then returning to the 23rd Precinct in Manhattan. This intensive investigation led the officers at 7:30 the next morning to the door of Payton's apartment. They knocked and called out, and although they saw a light shining from under the door and heard a radio from inside, they received no answer. Thus, they had "strong reason to believe that the suspect was [inside] and that he would escape if not swiftly apprehended" (A.41). In these circumstances, as Judge Wachtler said in the Court of Appeals below, "[i]t was reasonable for the police to continue their pursuit into the apartment in order to take a dangerous killer into custody" (A.82).

* *See e.g. United States* v. *Shye,* 492 F. 2d 886 (6th Cir. 1974); *Vance* v. *North Carolina,* 432 F. 2d 984 (4th Cir. 1970); *People* v. *Saars,* —— Colo. ——, 584 P.2d 622 (1978) (en banc); *State* v. *Ferguson,* 119 Ariz. 55, 579 P.2d 559 (1978) (en banc); *Pawloski* v. *State,* —— Ind. ——, 380 N.E. 2d 1230 (1978); *Commonwealth* v. *Moran,* —— Mass. ——, 345 N.E. 2d 380 (1976).

If, however, the Court believes that arrest and search warrants must be treated exactly alike, and that time is the only relevant factor, the question becomes whether the police had time to obtain an arrest warrant before they arrested Payton. That question, in turn, depends on when the police first had enough information to obtain one. One court has determined that, if a person's interest in his residence is to be protected by prior judicial review, the police must demonstrate probable cause to believe that the felon is actually inside the dwelling. *United States* v. *Prescott,* 581 F. 2d 1343, 1349-50 (9th Cir. 1978). In *Payton,* the police could not have made such a showing until 7:30 a.m. on January 15. On the previous day, Leggett pointed out Payton's building. But the police also had reason to believe Payton might not be at home. *See*

second footnote and accompanying text on p. 11, *supra*. It was not until they approached his door, saw the light and heard the radio that they had good reason to believe he was inside. Surely, they should not be faulted for failing to halt their pursuit then in order to obtain a warrant. *See* pp. 60-61, *supra*.

* * *

If the Court accepts either of our above formulations of an "exigent circumstances" exception, then the record in this case provides sufficient facts to show that the officers in *Payton* did not need a warrant before they entered Payton's apartment. Should, however, the Court conclude that the only relevant question is whether the officers had time to obtain a warrant and, further, that their duty to obtain one attached at some point before they reached Payton's door (for example, when they first had probable cause to arrest or first made a decision to arrest), then a remand is necessary for further development of the facts. *See Morales* v. *New York*, 396 U.S. 102, 105 (1969).

As noted, by apparent agreement among the parties and the judge, the scope of the suppression hearing was very narrow. *See* pp. 4-6, *supra*. Although some evidence concerning the investigation was elicited, the judge sustained objections by both parties to questions that sought to elicit testimony relevant to whether there was time to obtain a warrant—questions such as whether the police had spoken to an eyewitness to the murder before they went to arrest Payton (A.37), when the police first learned where Payton lived (A.33), whether they had been told by a witness when Payton would be home (A.35), and whether the police received any additional information between January 14 and January 15 (A.34). Consequently, the court's decision did not discuss the practicality of obtaining an arrest warrant. (The trial record does add some detail. However, the issue at trial was, of course, the defendant's guilt or innocence, not the admissibility of evidence.) Even if the scope of the suppression hearing had not been narrowed by the parties and the judge, litigants in 1974 could not be expected to foresee what factors this Court would think relevant in determining the existence of "exigent circumstances."* *See Givhan* v. *Western Line Consolidated School District*, —— U.S. ——, 58 L. Ed. 2d 619, 625-26 (1979). Accordingly, unless the Court agrees with the arguments concerning "exigent circumstances" we have advanced at pp. 76-80, *supra*, the Court should order a remand so that more information can be developed.

POINT II

Payton is not entitled to the benefit of the exclusionary rule because, when the police entered his apartment in January 1970, they did so under the express authority of a state statute, at a time when neither they nor any other law enforcement official could have had any serious doubts about the legality of following the statute.

In the previous pages, we have briefed the issue whether the officers needed an arrest warrant before they could lawfully enter Payton's and Riddick's apartments to effect an

* Contrary to appellants' statements, the Court of Appeals did not find the record sufficient to decide whether it was possible to obtain an arrest warrant. The majority did not concern itself with this aspect of the record since it determined that the arrest was valid regardless of whether a warrant could have been obtained. *See* p. 21, note, *supra*. Judge Wachtler found the failure to obtain a warrant excusable on a "continuous investigation" theory (with which we agree) that does not depend simply on whether the police had time to obtain a warrant.

arrest. For Payton, however, the question cannot be stated so abstractly. At least on this appeal, he has no legitimate interest simply in whether the police should have obtained an arrest warrant. His interest as a litigant is in whether their failure to obtain a warrant should result in the suppression of the shell casing introduced at his trial and the reversal of his conviction. This question, in turn, depends on the proper scope of the exclusionary rule.

Regardless of whether the officers should have had an arrest warrant before entering Payton's apartment, their failure to obtain one does not entitle Payton to the exclusion of the evidence. The officers had probable cause to believe Payton had committed a murder. They entered his apartment during the daytime. They entered under a statute which was enacted not to evade the commands of the Fourth Amendment but to codify accepted practice. In 1970, the officers had no reason to doubt the lawfulness of following this authoritative rule promulgated by the legislature. In these circumstances, giving Payton the benefit of the exclusionary rule would seriously undermine the salutary ends it is supposed to further.*

The exclusionary rule, as one commentator has put it, is strong, if necessary, medicine. Amsterdam, *Search, Seizure, and Section 2255: A Comment,* 112 U. Pa. L. Rev. 378, 389 (1964). In many instances, the rule permits guilty defendants to go free; in all, it keeps indisputably reliable

* Although not considered by the New York courts, this argument is properly raised here as an alternative ground for affirmance. *See United States* v. *New York Telephone Co.,* 434 U.S. 159, 166 n.8 (1977); *Dandridge* v. *Williams,* 397 U.S. 471, 475-76 n.6 (1970); *United States* v. *American Railway Express Co.,* 265 U.S. 425, 435-36 (1924).

and probative evidence from the trier of fact. *Bivens* v. *Six Unknown Agents,* 403 U.S. 388, 412, 416 (1971) (Burger, C.J., dissenting). For these reasons, the Court has refused to apply the rule when to do so would not substantially serve its benign purposes. *United States* v. *Ceccolini,* 435 U.S. 268, 279 (1978); *United States* v. *Calandra,* 414 U.S. 338, 348 (1974). *See, e.g., United States* v. *Janis,* 428 U.S. 433 (1976); *United States* v. *Peltier,* 422 U.S. 531 (1975); *Michigan* v. *Tucker,* 417 U.S. 433 (1974); *Alderman* v. *United States,* 394 U.S. 165 (1969).

The primary aim of the exclusionary rule is to decrease the incidence of illegal conduct by the police. *United States* v. *Calandra,* 414 U.S. at 347-48. Theoretically, the rule encourages compliance with the Fourth Amendment "by removing the incentive to disregard it." *Elkins* v. *United States,* 364 U.S. 206, 217 (1960). Put another way, if the officer disobeys the commands of the Constitution, the rule "punishes" that officer—or those prosecutors and higher-level police officials who supervise and instruct him—and thereby deters both him and others from future misconduct. *See United States* v. *Peltier,* 422 U.S. at 558-59 n.18 (Brennan, J., dissenting).

When a court excludes evidence, it also affects police behavior in a different, more subtle way. If an officer sees that the judiciary "attach[es] serious consequences to the violation of constitutional rights," he may perhaps learn from the court's example that in our society, the people's liberties must be respected. *United States* v. *Peltier,* 422 U.S. at 555 (Brennan, J., dissenting), quoting Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. Chi. L. Rev. 665, 756 (1970). If, on the con-

trary, a court admits tainted evidence, it breeds a general contempt for law and may lead the policeman, like the public at large, to believe that "all government is staffed by self-seeking hypocrites. * * *" Paulsen, *The Exclusionary Rule and Misconduct by the Police,* 52 J. Crim. L., C. & P.S. 255, 258 (1961). *See also Olmstead* v. *United States,* 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). Indeed, since actions speak louder than words, the officer may come to think that the court approves the methods used and actually encourages the illegality. *See id.* at 470 (Holmes, J., dissenting); Amsterdam, *Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349, 431-32 (1974).

Whether coercive or exemplary or both, the lesson of the exclusionary rule will surely be lost unless the exclusion is based on what an honest, law-abiding, reasonable officer can understand to be an infringement of a very important constitutional norm. Police officers will not be encouraged to learn the law in order to submit to it—let alone, internalize its values in order to obey it voluntarily—if they are led to regard its operation on them as freakish, capricious and unpredictable. For the exclusionary rule to work at all, the courts must in essence tell policemen: "When you conduct yourselves unlawfully, we will exclude the evidence you seize. But when you behave in a lawful manner, we will accept it." The point is to support the police: not unthinkingly, but rather in such a way as to enhance their comprehension of—and respect for—law, and thereby promote compliance with the Fourth Amendment.

Applying the exclusionary rule in *Payton* can only diminish its effectiveness. How can a policeman, or indeed

any reasonable person, understand why the shell casing should be excluded? Police officers are supposed to conform their conduct to law; here, they did so. *Payton* is not a case in which the police took it upon themselves to judge the legality of entering a dwelling to make an arrest without a warrant. They acted under the express authority of a state statute, designed specifically to govern and limit police power to make arrests.

That statute was passed in 1881. No one could suggest that it was passed in order to evade the commands of the Fourth Amendment. On the contrary, it was designed to codify what was widely understood as accepted practice. *See* p. 46, *supra.** Not only New York but numerous other states had enacted laws empowering police officers to make warrantless arrests in dwellings. *See* ALI, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Commentary, Appendix XI (1975) (as of 1975, 30 of the 36 states having statutes on the subject authorized warrantless forcible entry to arrest for a felony) (hereinafter "PRE-ARRAIGNMENT CODE"). The New York Court of Appeals had said that the legality of such entries depended simply on the existence of probable cause to make the arrest. *People* v. *Loria,* 10 N.Y.2d 368, 373, 179 N.E.2d 478, 482, 223 N.Y.S. 2d 462, 467 (1961). Only one court, in the District of Columbia, had come to a different conclusion. *Accarino* v. *United States,* 85 U.S. App. D.C. 394, 179 F.2d 456 (1949).

* *Compare Michigan* v. *DeFillippo* (U.S. No. 77-1680, *argued* Feb. Term 1979), where the state is urging a definition of the exclusionary rule similar to ours. Respondent has claimed that the statute in question there was passed specifically in order to undercut the protections of the Fourth Amendment. That statute makes criminal the failure to produce identification when ordered to do so by a policeman. *See* Respondent's Brief at 4-6 & nn. 4-7, and 16-19.

And even that court had, nine years after *Accarino*, reversed itself twice within seven months.* In any event, both before and after the District of Columbia cases, this Court had accepted (without directly deciding) the validity of felony arrests made in dwellings during the daytime. *See* discussion of cases at pp. 48-49, *supra*.

Thus, when the officers entered Payton's apartment to arrest him in January 1970, they were acting in accord with a statute that had been part of New York's living law for almost one hundred years. Neither the officers nor their supervisors had any reason to doubt the legality of the entry.** As we have said, the exclusionary rule can work only if it teaches policemen that it matters whether or not they make their best efforts to obey the law. But exclusion of the evidence in Payton's case could only impart the opposite lesson: that it does not make a bit of difference whether or not they try to adhere to the rules. The shell casing will be barred not because the constable blundered but rather because he followed the law. Lessons like this one breed confusion, cynicism and scorn for law. Obviously, these are not the attitudes that the exclusionary rule should foster.

Implicitly recognizing this logic, the Court has already refused to apply the exclusionary rule in very similar circumstances. In *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973), the Court held that agents of the Border Patrol could not stop and search a car, without probable cause and without a warrant, about 25 miles from the Mexican border. Then, in *United States* v. *Peltier*, *supra*, the Court confronted another roving patrol inspection, conducted four months before the decision in *Almeida-Sanchez*. The items found in the course of searching Peltier's car were not excluded from evidence because the agents could not have foreseen the holding in *Almeida-Sanchez*. They had acted in reasonable "reliance upon a validly enacted statute, supported by long-standing administrative regulations and continuous judicial approval." Mr. Justice Rehnquist wrote for the Court:

> Since the parties acknowledged that *Almeida-Sanchez* was the first roving Border Patrol case to be decided by this Court, unless we are to hold that parties may not reasonably rely upon any legal pronouncement emanating from sources other than this Court, we cannot regard as blameworthy those parties who conform their conduct to the prevailing statutory or constitutional norm. Cf. *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971); *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973). If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.

422 U.S. at 541-42 (footnote omitted).*

* *Compare Smith* v. *United States*, 103 U.S. App. D.C. 48, 254 F.2d 751, *cert. denied*, 357 U.S. 937 (1958) *with Morrison* v. *United States*, 104 U.S. App. D.C. 352, 262 F.2d 449 (1958).

** By contrast, when the police went into Riddick's apartment in March 1974, dictum in *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971) had clearly raised the issue of whether it was constitutional for officers to make warrantless arrests in dwellings during the daytime.

* In *Almeida-Sanchez* itself, the Court applied the exclusionary rule even though, as in *Peltier*, the agents undertook their search before the practice was found illegal. However, as noted by the Court in *Peltier*, the government in *Almeida-Sanchez* did not urge a construction of the exclusionary rule that would have precluded its use in that case. 422 U.S. at 542 n.12.

Responding to the majority opinion, Mr. Justice Brennan, in dissent, suggested several reasons why a defendant should get the benefit of the exclusionary rule even though the police might not have known their behavior was unlawful. Whatever the strength of these arguments in other contexts, they have little validity here.

According to Mr. Justice Brennan's argument, if the exclusionary rule were construed to apply only to "bad faith" action, the police might be encouraged invariably to choose a course of conduct "that compromises Fourth Amendment values." 422 U.S. at 559. For example, such a definition of the exclusionary rule could give the police an incentive to assume the existence of probable cause in marginal cases or to remain wilfully ignorant of developing legal principles. Moreover, since an officer who obtained a warrant could always be said to have acted in "good faith" reliance on the magistrate, a "good faith" rule would give the magistrate unreviewable power to determine probable cause. *See United States* v. *Peltier,* 422 U.S. at 559 n. 18 (Brennan, J., dissenting). Finally, an exclusionary rule dependent on the "good faith" of a police officer might embroil the courts in difficult factual determinations concerning subjective mental states or "reasonable objective extrapolations of existing law." *Id.* at 560.

These problems would not be raised by the formulation of the exclusionary rule we are proposing. We are not urging the Court to allow evidence to be admitted whenever officers in "good faith" follow their own precepts, or even the precepts of a lower judicial officer, about what constitutes

legal behavior. We are urging a much narrower rule that would admit evidence only when, as in Payton's case:

(1) the police follow an unambiguous pronouncement;

(2) that pronouncement is a statute;

(3) the statute clearly was not designed to evade Fourth Amendment requirements; and

(4) at the time the officers act neither they, their supervisors in the police department, nor the district attorneys with whom they work could have any reasonable doubt about the constitutionality of the officers' conduct under the statute.

This formulation avoids the pitfall of "rewarding" police decisions to interpret either the applicable law or the facts of specific cases in a manner that invariably compromises Fourth Amendment values. Our proposed definition of the exclusionary rule also would encourage police officers to defer to legislative judgments—a desirable result since, in a democratic society, representative elected bodies bear the primary responsibility of setting guidelines for the police.

In addition, Mr. Justice Brennan expressed concern that if the exclusionary rule were applied only when the police act in "bad faith" (that it, only when there is clear precedent holding their conduct unconstitutional), judicial development of the Fourth Amendment "could stop dead in its tracks."

> For if evidence is to be admitted in criminal trials in the absence of clear precedent declaring the search in question unconstitutional, the first duty of a court will be to deny the accused's motion to suppress if he can-

not cite a case invalidating a search or seizure on identical facts.

422 U.S. at 554.

This argument is based on a faulty premise. Courts do not decide cases by mechanically applying the rule of previous cases dealing with the same facts. Most often, and especially in the Fourth Amendment area where the facts are always peculiar to individual cases, prior rulings are used not as strait-jackets but as analogies. Accordingly, a court will reach the merits of a defendant's constitutional claim even if the defendant cannot find a case holding in his favor on "identical facts."

Moreover, since constitutional norms may be articulated and developed by analogy in a number of different ways, a court faced with a claim under the Fourth Amendment will properly draw on many sources in addition to decisions concerning the admissibility of evidence. For example, Fourth Amendment principles may be derived from civil litigation —such as tort actions and Section 1983 lawsuits for damages or injunctive relief—in state or federal jurisdictions. *See, e.g., Bivens* v. *Six Unknown Agents, supra; Lankford* v. *Gelston,* 364 F.2d 197 (4th Cir. 1966); *Broughton* v. *State,* 37 N.Y.2d 451, 335 N.E.2d 310, 373 N.Y.S.2d 87, *cert. denied,* 423 U.S. 929 (1975). Fourth Amendment principles may also evolve and find expression in state constitutions, in legislative and executive actions and pronouncements, and through the writings of legal scholars and codifiers. *See, e.g.,* PRE-ARRAIGNMENT CODE and Commentary.

The definition of the exclusionary rule we are urging would not excuse a court from considering these developments or deny a defendant their benefits. The rule would simply allow the state to show, if it could in a particular case, that no such developments could reasonably have alerted the police not to follow a controlling legislative pronouncement. Thus, under the definition we propose, the onus of citing "clear precedent" in their favor would rest on prosecutors seeking to avoid the application of the exclusionary rule and not, as Mr. Justice Brennan feared, on defendants seeking to invoke it. Where the state could not meet this stringent burden, judges would have to decide the defendant's Fourth Amendment claim on the the merits.

In sum, suppressing the evidence found as a result of the entry in *Payton* could only undercut the salutary aims of the exclusionary rule. On the other hand, an exclusionary rule that would admit the evidence would not impede the healthy growth of substantive Fourth Amendment principles. Nor would that rule encourage the police to find ways to violate the law. On the contrary, such an exclusionary rule would reward them for making their very best efforts to follow the law. In that way, it would promote adherence to the Fourth Amendment, which is, of course, what the exclusionary rule is all about.

Conclusion

***For the reasons stated above, the judgment of the Court of Appeals in No. 78-5420* (Payton) *and No. 78-5421* (Riddick) *should be affirmed. In the alternative, a remand for further proceedings should be ordered in No. 78-5420* (Payton). *See pp. 80-81,* supra.**

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